No. 69

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BRIEF, ARGUMENT AND AUTHORITIES

Brief of Daggs for Appellants

CASE NO. 69

IN THE SUPREME COURT OF THE UNITED

Filed Dec. 28, 1900.

OCTOBER TERM, 1900.

A. L. JOHNS, W. A. DAGGS, R. E. DAGGS, AND A. J. DAGGS, APPELLANTS.

vs.

JAMES WILSON,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

A. J. DAGGS,
Attorney for Appellants.

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BRIEF. ARGUMENT AND AUTHORITIES.

STATEMENT OF CASE.

The facts out of which this alleged action arose as shown by the record are as follows: One John S. Armstrong, on April 24, 1893, bought of James Wilson 111 acres of land adjoining the City of Tempe, A. T., together with 66 inches of water in the Tempe canal, also Share No. 2 in the McKinney and Kirkland ditch and rights of way through all lateral ditches to the land conveyed. Also 5 lots in the City of Tempe, all in Maricopa County, Arizona Territory, (see Mtg., page 50, printed record) also (R. P. 67, F. 121, R. P. 68, F. 125) of the value of over 12,000 dollars, exclusive of the city lots. It appears that said John S. Armstrong in payment executed his two promissory notes for 3250 dollars each, in duplicate, except one note was due one year later than the other. (See Record p. 52.) To secure these two notes, said Armstrong executed a mortgage on the entire property thus purchased. (See R. P. 50.)

At that time, April 24, 1893, W. A. Daggs, one of the appellants, was then living with his family on the 111 acres farming same, as the tenant of appellee, and had been since Jan. 8, 1892. (See R. P. 65-66.)

After the sale from appellee to John S. Armstrong said W. A. Daggs became the tenant of Armstrong and continued to reside upon the property. (See R. P. 65-66.)

Afterward, on Dec. 18, 1893, said John S. Armstrong sold a part of the property, the one 111 acres of land, the 66 inches of water and all ditch rights and conveyed the same by warranty deed with covenants to R. E. Daggs for the sum of Eleven thousand dollars, ($11,000) (See R. P. 35) reserving to himself city lots in Tempe. (See R. P. 35.)

When said Armstrong sold out to R. E. Daggs (appellant), W. A. Daggs (appellant) became the tenant of R. E. Daggs and continued to reside upon the land and cultivate same. (See R. P. 66.)

Afterward on March 17th, 1894, R. E. Daggs, app., sold the 111 acres of land, 66 inches of water and ditch rights, (the same property purchased of John S. Armstrong) to A. L. Johns, of Chicago, and conveyed the same by warranty deed with covenants to said Johns, for Eleven thousand Five Hundred dollars ($11,500.00). (See R. P. 37.) W. A. Daggs arranged and became the tenant of A. L. Johns on April 1st, 1894, and continued to reside upon the land with his family and cultivate the same. (See R. P. 66.)

With these facts all in the possession of the appellee, James Wilson, he files his first piecemeal foreclosure bill, April 26, 1894. (See R. P. 39,40, 41, 42.)

His first piecemeal bill shows: (1st) That he sues John S. Armstrong, the mortgagor, and seeks a personal judgment against him upon the notes and asks to have the mortgage foreclosed on a part only of the mortgaged property, omitting therefrom the 5 city lots. (2d) That he sued R. E. Daggs on an alleged assumption of the notes and mortgage, and sought a personal judgment against him on the notes and asked to foreclose the mortgage on the same property, omitting the city lots. (See R. P. 39.) The record further shows that default was made by John S. Armstrong and R. E. Daggs. (See R. P. 45.) A judgment followed to which we call special attention. (See R. P. 45.) This judgment shows that James Wilson, appellee, took a personal judgment against John S. Armstrong, the mortgagor, for the full amount of his alleged debt. That he did not take any personal judgment against R. E. Daggs at all. That he took a foreclosure of his mortgage against John S. Armstrong, the mortgagor, and after in a subsequent clause of the judgment this language is used, to-wit:

"And that the defendant and all persons having liens subsequent to said mortgage, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of the notice of the pendency of this action in the office of the County Recorder of Maricopa County, Arizona, *on the 11th day of March, 189½*, (The suit was filed April 26, 1894.) be forever bar red and foreclosed by and from all equity of redemption and claim in and to said mortgaged premises and every part thereof from and after the expiration of said six months from the date of said sale."

It is seen the name of R. E. Daggs does not appear in the judgment except in the caption. This judgment bears date of May 8th, 1894. (See R. P. 45.)

Afterward on May 12, 1894, an order of sale issued wherein broad terms appellee declared that he had on May 8th, 1894, recovered a personal judgment against R. E. Daggs for the sum of ($7,155.08) Seven Thousand One Hundred and Fifty-five Dollars, with foreclosure of the mortgage lien. (See R. P. 47.) Also on the same day, May 12, 1894, of the issuance of this order of sale the sheriff levied upon the land described in the piecemeal foreclosure bill. (See R. P. 49.)

The same property was thereupon advertised by the sheriff (R. P. 49) and sold to one James Wilson for $7,444, which amount the sheriff declared, "I acknowledge to have received." (See R. P. 50, F. 89.) This language is followed at the same page and folio with the following language, to-wit:

"And I further certify that I deducted from the said sum of $7,444 my fees, commissions and expenses, amounting to the sum of $253.90, leaving a net balance of $7,190.10, which net balance I have paid over to plaintiff's attorney, whose receipt therefor is hereto attached, and I herewith return this writ partially satisfied in the sum of $7,190.10, there still remaining due and unpaid on said judgment interest and costs the sum of $9.50.

"J. K. Murphy, Sheriff.

"By Frank M. King, Deputy Sheriff.

"Dated June 6, 1894." (See R. P. 50, Folio 89.)

The above language is followed by the following, to-wit:

"(7,190.10.) Phoenix, A. T., June 6, 1894.

"Received from J. K. Murphy, Sheriff of Maricopa County, Arizona, the sum of $7,190.10, amount of sale in

the case of James Wilson vs. John S. Armstrong, after deducting sheriff's fees, commission and costs.

"Thomas Armstrong, Jr.,
"Attorney for Jas. Wilson, Plaintiff."

(See R. P. 50, F. 89.)

The verity of the above record has never been questioned.

Appellee rests after sale of June 6th, 1894, to June 22, 1895, when by the same attorney, Thos. Armstrong, Jr., files another peicemeal foreclosure bill, changes front, eliminates John S. Armstrong, the mortgagor, sues R. E. Daggs, the mortgagor grantee, second time on the same alleged contract of assumption of the notes and mortgage as in his first piecemeal foreclosure, and seeks to foreclose the mortgage to satisfy the damage arising from the alleged breach of the contract of assumption on the 111 acres of land, water and ditch rights mentioned in his first piecemeal foreclosure and in addition thereto includes the city lots owned by the mortgagor, John S. Armstrong.

Appellee also attacks R. E. Daggs vehemently and alleged that he had been conspiring, as he was verily informed and verily believes, in that he had withheld the deed from the record, from R. E. Daggs to A. L. Johns in order to cheat and defraud him, (see R. P. 4.) although appellee alleges this deed was filed two days after his *lis pendeu*, yet there is no such a paper in this record. And appellee prays a judgment against R. E. Daggs for such conspiracy. Appellee also now for the first time makes A. L. Johns the grantee of R. E. Daggs, a party and sues him on an alleged assumption of his alleged claim, and also seeks to foreclose the same mortgage on the 111 acres of land, water and ditch rights sought to be foreclosed in his first piecemeal foreclosure bill and in addition the city lots, to satisfy the damage arising, it is said, out of the breach of the alleged contract of assumption to pay such alleged claim. (See R. P. 1.)

Appellee attacked A. L. Johns also and after sueing him as above on a so-called assumption in the conveyance from R. E. Daggs to Johns, alleged on information and belief that A. L. Johns paid "*nothing* whatsoever for said conveyance." No further iniquity is charged against A. L. Johns except he prays for 1000 dollars, "His additional damage by reason of the premises stated as aforesaid," beside costs of this action.

Appellee also for the first time makes A. J. Daggs a party and accuses him of conspiring to "hinder, delay and obstruct" the collection of his alleged claim in connection

with R. E. Daggs, while acting as the agent of R. E. Daggs, by procuring a deed to be made, and caused same to be withheld from the record until two days after his first piecemeal foreclosure suit had been filed.

It is observed that this is same deed from R. E. Daggs to A. L. Johns, date March 17th, 1894, and filed for record April 28th, 1894. (See R. P. 35.)

Appellee next makes W. A. Daggs, the tenant, a party and accused him in furtherance of such alleged conspiracy to have "claimed and asserted" on April 28, 1894, to have abandoned the premises (the 111 acres of land) as the tenant of R. E. Daggs on April 1st, 1894, to have become the tenant of A. L. Johns, and charged that this abandonment and releasing was done secretly and without any notice to him, appellee, and that this tenant had done this renting with intent to deceive him (appellee) into the belief that R. E. Daggs was the owner of the property, and by reason of such secret renting appellee was deceived and this is the excuse he offers for not making A. L. Johns and W. A. Daggs party to his first piecemeal foreclosure and that he did not know that any other person than R. E. Daggs had any claim or interest in the property when he filed his first piecemeal foreclosure. (See R. P. 5.)

Next appellee makes the bold statement that those living in the territory liable to pay his so-called claim are insolvent, while all others are beyond the jurisdiction of the court. He does not say who is in the teritory or who is out, or whether they have or have not property, and that he is in danger of losing a portion or all of his alleged claim unless resort can be had to the pretended lien upon the property. (See R. P. 6.)

Appellee now prays that he have personal judgment against R. E. Daggs and A. L. Johns for breach of the alleged assumption of the notes, also for tax and insurance. Appellee also prays a judgment for his so-caled conspiracy for 1000 dollars' damages against R. E. Daggs, A. J. Daggs, W. A. Daggs and A. L. Johns, not as against each, but as a lump sum against all. Appellee also prayed for a receiver to take charge of the property. (See R. P. 6.)

Appellants answered separately by general demurrer and general denial.

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT.

Afterward A. L. Johns and R. E. Daggs amended their answers, setting up special demurrers and other matter. The demurrers and motions were all overruled and the case went to trial.

We have assigned such error as we believe have actual substance, and instead of printing them as a whole together and then reprinting at the head of each argued. We will number them, print them in capitals at the beginning of the argument upon each *seriatum*.

The Hon. Fletcher M. Doan, in his opinion below, after quoting nearly three pages from the complaint of the appellee, said:

"The errors assigned are numerous; but as many of them are upon *immaterial points*, and some are *without merit*, it will only be necessary to consider those that go to the vital issues in the case."

Appellants are not surprised at this statement, as the honorable gentleman who wrote had served and grown old in the circuits, expounding ecclesiastical law, having failed at that, upon the election of the Honorable William McKinley and through the influence of the Hon. Sam Peters, congressman from Kansas, he was appointed judge on the Supreme bench of Arizona, and is now jurist and expounds the laws of men. And while it appears from this statement that all the errors were noticed and decided, yet further on in the opinion this language appears: "*Presuming* the decree declaring the deed void is correct and that the evidence fully sustains it," which shows that the trial branch of the contention was never looked at. That he was convinced upon reading the appellee complaint that every-day transaction were deep-seated and villainous frauds, and never examined the trial branch of the case to see whether the acts were proved or not, but *presumed* they were.

Appellants were nearly 18 months getting a statement of facts and during this time counsel for appellants approached one of the other udges, Hon. R. E. Sloan, about the statement of facts, who informed counsel that he would have to see the Hon. Fletcher M. Doan; that the case had been assigned to Doan; that Doan wrote the opinion; that he (Sloan) had merely signed it and knew nothing whatever about it.

And thus we have it, that while counsel have been criticised for assigning numerous errors, how can it be oth-

erwise when the complaint of the appellee begins by joining actions ex contracto with actions ex delecto, and actions against same defendants in which other defendants have no interest and are not charged and this complaint sustained against a demurrer of misjoinder of actions and parties, is it not true that every step thereafter is but an error? This is only one of numerous fatal defects against the complaint of appellee.

Moreover, the law compels a lawyer to assign error. The courts of ability do not always agree. How can any lawyer proceed unless he assigns every error in which he has color of logic and law to sustain and wage it before the court for consideration? Is it, then, for those of inexperience to criticising numerous assignments of error?

Owing to the manner in which the appellee sued the appellants in his blunderbus complaint, squinting at this cause of action, alluding to that cause and so mixing up in a conglomeration of statements so many different matters it is difficult for appellants to lay their assignments as they would like to do, but will attempt to reach it as concisely as possible, and beg pardon of the Honorable Court for being compelled to assign the errors thus.

An analysis of the complaint of plaintiff discloses a misjoinder of causes of action and is multifarious. Appellants A. L. Johns and R. E. Daggs each struck at this defect in their separate answers by special demurrer which was overruled by the court, assigned as error below and reassigned here.

ASSIGNMENT OF ERROR NO. 1.

"THAT THE COURT ERRED IN OVERRULING THE SPECIAL DEMURRER OF APPELLANTS A. L. JOHNS AND R. E. DAGGS ON THE GROUND THAT APPELLEE HAS JOINED IN HIS BILL CAUSES OF ACTION EX CONTRACTO WITH CAUSES OF ACTION EX DELICTO."

The bill shows R. E. Daggs sued for the breach of an alleged contract of assumption of the two notes set out in the complaint. He is also sued to foreclose a mortgage lien to satisfy the damages arising from the breach of that alleged contract of assumption. This on actions ex contracto.

R. E. Daggs is also sued for damages for an alleged conspiracy wherein R. E. Daggs is charged to have coluded with A. J. Daggs and caused the deed of R. E. Daggs to A. L. Johns to have been withheld from the record for

about 30 days, and upon this so-called wrong and injury and action ex delicto, appellee prays damages in a lump sum against all parties concerned in it for $1000.00. These two actions ex contracto and ex delicto are joined together against R. E. Daggs.

A. L. Johns sued in this same bill upon a different alleged contract of assumption of the pretended claim. Another action ex contracto. A. L. Johns is charged with allowing the deed from R. E. Daggs to him to be withheld from the record and this act is said to be an act of conspiracy, ex delicto, and it is prayed that he, along with the others, be held under the lump sum judgment for 1000 dollars as damages. Thus an action ex contracto and an action ex delicto is joined as to A. L. Johns.

It is thus seen that upon the actions *ex conttacto* neither of these parties here had anything to do with the other's contract, and joined with these so-called actions ex contracto and ex delicto.

A. J. Daggs is alleged to have participated as agent of R. E. Daggs in the so-called conspiracy of executing and withholding the deed from R. E. Daggs to A. L. Johns from the record for about 30 days from date of its execution, and he too is joined and sued for damages along with R. E. Daggs and A. L. Johns in the lump sum of 1000 dollars.

Joined with the above alleged actions W. A. Daggs, the tenant, while he is admitted to be all the time in possession and on the premises, is charged to have declared on April 28th, 1894, to have ceased to be the tenant of R. E. Daggs and to have become the tenant of A. L. Johns on April 1st, 1894, and appellee now undertakes to say that he was by such releasing deceived into the belief that R. E. Daggs was the only person owning the premises, and now by these charges seeks to excuse himself for not having made A. L. Johns and W. A. Daggs the tenant parties to his first foreclosure and says he had no notice whatever that any other person than R. E. Daggs had any interest in the property. In his prayer W. A. Daggs is, along with the other alleged co-conspirators, asked to pay $1000 damages, (See R. P. 1 to 6 inclusive.) while W. A. Daggs is by the appellee admitted to have been in possession of the property at the date of bringing his first foreclosure.

Appellee next claims that six months after his his first judgment he went upon the premises, and there pretends to *find* the tenant, W. A. Daggs, in possession.

Now assuming without admitting that the appellee has stated causes of action in his complaint, in his judgment instead of taking a money judgment for damages, as he

had prayed, he makes his so-called conspiracy a ground for setting Johns' deed aside after he had taken personal judgment and foreclosure against him.

And we urge that the appellee complaint presents a bad case of misjoinder under the Arizona statute as well as under the equity rule of multifariousness. Such a joinder is, in violation of an express inhibition of the statute of Arizona.

Rev. Stat. A. T., Par. 670, Sec. 22, is to-wit:

"Only such causes of action may be joined as are capable of the same character of relief, but actions *ex conttacto* shall not be joined with actions *ex delicto*. In actions *ex delicto* there shall not be joined actions to recovery for injuries to the person, to property or to character, but they shall be sued for separately."

This statutory inhibition is but the adoption and repetition of the principal of the equity rule against multifariousness with which the honorable court is familiar.

"A bill is multifarious where several plaintiffs demand by one bill, several matters entirely destinct and separate or where, in the same bill several matters of distinct natures are demanded against different defendants," or to quote the time-honored formula: "The improper joining in one bill of distinct and disconnected matters and thereby confounding them."

Walker vs. Powers, 104 U. S. 245,

Where the objection is to matter it is said:

"Two things must concur, 1st the grounds of suit must be different; second each ground must be sufficient as stated to sustain a bill."

Brown vs. Guarantee Trust etc. Co. 128 U. S. 403.

The test sometimes is whether the causes of action united require separate proofs and separate decrees.

Walker vs. Powers, 104 U. S. 245, supra.

Should the court enforce these familiar principles at threshold it will do no injury to any one. Why? because the record shows that the mortgagee already has a judgment against the mortgagor which he is refusing to enforce where he well knows the mortgagor is the one he should look to for his pay. Why? Because when the mortgagor sold he got full payment for the property from his grantee and gave a warranty deed with covenants to warrant to defend the property in dispute against *all* claims. Can the mortgagor be injured? No. Why? Because he received from his grantee the cash to meet the

claim of this very appellee and agreed to pay him. The mortgagor also reserved to himself all the city lots beside, and thus so far each will be compelled to follow his own individual contracts. Will the first grantee of the mortgagor be injured? No. Why? Because he received as he testifies, from A. L. Johns all he had paid out and a profit, and he, too, warranting the property against all claims to Johns. Will the grantee of the grantee of the mortgagor be injured? No. Why? Because he will get the property he contracted and paid for and cannot complain, and will not complain, and thus each and all will be made whole and be compelled to stick to their contracts. Instead of, as it is, the appellee refusing to follow his contract and following after a remote and disputed legal right and refusing to even issue execution against his mortgagor, who is worth $30,000, in the jurisdiction of the court, and attempting to compel those to pay who never agreed to pay, and bringing a multiplicity of litigation, seeking to obtain property worth now $15,000 for an alleged claim of $6500. The court can therefore do no injury to any one by dismissing this multifarious bill, but do right:

Otherwise, if this judgment is permitted to stand, what will happen? Appellee will be enabled to receive the cash difference between the mortgage and purchase, get the property now worth $15,000 for his alleged $6,500 claim, beside have two personal judgments vs. R. E. Daggs for the claim. The mortgagor will thereby be enabled to retain the city lots and the $11,000 received from his grantee, R. E. Daggs and Johns will have two judgments against him with his deed set aside as well, and thus be enabled to keep the money he had received to pay off this very claim, and his profit and city lots.

Therefore we urge this defect to be of the substance of the action and fatal to the complaint.

Shipman's Cemmon Law Pleading, page 376, Art. 259.

It is reachable by special demurrer.

Stephens on Pleading, pages 158 and 159.

We then contend that the honorable court should dismiss this complaint and order restitution of all things to the appellants that they have lost.

ASSIGNMENT OF ERROR NO. 2.

THE COURT ERRED IN OVERRULING THE SPECIAL DEMURRER OF A. L. JOHNS AND R. E. DAGGS ON THE GOUND: "THAT THE PLAINTIFF HAS MISJOINED PARTIES DEFENDANT."

The bill shows on its face that the cause of action, so-called, of the assumption of the debt and mortgage by R. E. Daggs, that no other party to the suit has any interest in that action. It is on a separate contract pretended against R. E. Daggs.

The same is true of the alleged assumption of the same debt and mortgage by A. L. Johns. It is on a pretended contract between R. E. Daggs and A. L. Johns—W. A. Daggs and A. J. Daggs having no interest in that the alleged cause of actions for conspiracy against R. E. Daggs W. A. Daggs and A. J. Daggs or A. L. Johns is not alleged to have any connection with the so-called contracts of assumption or the notes or mortgage. It is therefore a multifarious bill as to parties.

This objection is a fatal objection under the statutes of Arizona.

Par. 692, Revised Statutes of Arizona, is as follows:

"Of the parties to the action those who are united in interests shall be joined as plaintiffs or defendants, but if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint; and where the question is one of common or general interest to many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

This rule applying to those who are united in interest is but a reiteration of a familiar rule of equity pleading, and when it appears upon the face of the bill that parties have been united as defendants who have no interest whatever in the contract set forth or torts, it is one appearing on the face of the bill, the defendants may either demur, move in arrest of judgment, or have a reversal upon writ of error or appeal.

First Ch. Pl. p. 44.

This defect is so palpable it is unnecessary to cite any authorities whatever. The honorable court should dismiss this action without further inquiry and order restitution.

U. S. vs. Alexander, 4 Crouch (cc) 311.

German Mut. Life Ins. Co. vs. Grim, 33 Ind. 249.

Crawford vs. Nolan, 70 Ia. 97.

Bartholomew vs. Candy, 14 Pick: (Mass.) 167.

Should the Court alow the complaint to pass this defect appellants A. L. Johns and R. E. Daggs make the fol-

lowing obections under their assignments of error, and the Second, Third, Fourth and Fifth assignments of error will be grouped together and argued.

These grounds of special demurrer laid in court of first instance and overruled were assigned as error in court below and reassigned for consideration here.

ASSIGNMENT OF ERROR NO. 2½.

THE COURT ERRED IN NOT SUSTAINING THE SPECIAL DEMURRER ON THE FOLLOWING GROUNDS, TO-WIT: "THAT THE PLAINTIFF IS NOT ENTITLED TO RECOVER IN THIS ACTION IN HIS OWN RIGHT."

3. "THAT THIS ACTION IS NOT BROUGHT, AND THE PLAINTIFF (APPELLANT) IS NOT SUEING IN THE RIGHT OF THE MORTGAGOR."

4 "THAT BECAUSE THE PLAINTIFF (APPELLEE) SHOWS NO PRIVITY OF CONTRACT BETWEEN HIM AND THESE APPLLANTS."

5. THAT BECAUSE NO REASON IS SHOWN WHY THE APPELLEE AT FIRST AND FORMER JUDGMENT IS NOT SUFFICIENT.

These appellants contend that these grounds of exception contained in their Special Exceptions, are fatal to the right of the appellee to maintain this complaint as against them, for the reason that the appellee has no cause of action against them of any kind or character on the grounds set up in the complaint, wherein the appellee purports to sue these appellants on an alleged assumption of the mortgage debt; which contract of assumption is alleged to have been made in the deeds between the grantee of the mortgagor and between the grantee of the grantee of the mortgagor; and that under the rules as laid down by this Court, that this alleged mortgagee has no cause of action whatever against either of these appellants.

The rule as laid down by this Court in Union Mut. Life Ins. Co. vs. Hawfard, 143rd U. S. 187, speaking through the learned Justice Gray, said:

"By the settled law of this Court, the grantee is not directly liable to the mortgagee, either at law or in equity, and the only remedy of the mortgagee against the grantee is by a bill in equity in the right of the mortgagor, and by virtue of the right in equity of a creditor to avail himself of any property which his debtor holds from a third person for the payment of the debt."

Citing in support of the rule, *Keller vs. Ashford, 133rd U. S. 610*, where a mortgagee attempted to maintain an action against the grantee and his mortgagor, where it appeared clear that the grantee had assumed and agreed to pay in a deed, and this Court refused to entertain the cause of action on the ground that such action could not be maintained because there was "no privity of contract."

And further said and *explained* that before such an action could be maintained it must be alleged and proved by the mortgagee that his mortgagor had been exhausted. While this record here shows appellee is refusing to make his claim off the mortgagor who is shown to be worth over $30,000, within the jurisdiction of the court.

And cited in support of the rule the cases of

Nat'l Bank vs. The Grand Lodge, 98 U. S. 103.

See also Willard vs. Wood, 135 U. S. 309.

Again it is not shown here in this bill that the grantee of the mortgagor ever had any contract or agreement with the mortgagee and in fact, it is not shown that any consideration ever passed to such mortgagee from grantees, or that he ever knew the grantees or either of them. Under such circumstances how could there be any privity of contract?

Shephard vs. May 115 U. S. 505.

The rule here announced by this Honorable Court was again put to the test in case of ——————— vs. ———————, 111th U. S. 103, where the mortgagor released his grantee from his contract of assumption and afterwards the mortgagor's mortgagee sued the grantee upon his contract of assumption, and this Court, in passing upon the question of whether or not such an action could be maintained by Mr. Justice Gray, said: "That the mortgagee had no part in obtaining and paid no consideration for that agreement, and under the most favorable construction had no greater right under it than the mortgagor with whom it had been made; or, in other words, there is no privity of contract, or that the mortgagee obtained no rights, and of course by such release by the mortgagor of his grantee, lost nothing, and could not as a consequence maintain an action against such grantee. Privity of contract must be shown."

This is undoubtedly a sound exposition of the law.

This is the rule in equity.

Storey Equity Pleadings 262, 324.

A well considered case is *Code States 64th Cal. 364, Bidell vs. Brizzolara*, which was a case where a mortgagee

had attempted to sue a grantee of his mortgagor. And the Court said:

"That the general rule is, and always has been, that a plaintiff in an action in a simple contract must be the person from whom the consideration actually moved, and that a stranger to the consideration cannot sue on the contract."

And further said: "That the rule is sometimes expressed thus. There must be privity of contract between the plaintiff and the defendant in order to render the defendant liable to an action by the plaintiff on the contract."

And further said: "That a mortgagee can only be entitled to be subrogated to an existing remedy of his debtor, the mortgagor, upon legal existing stipulations."

And further announced that his could never happen unil it was shown that the mortgagee had exhausted his creditor, the mortgagor, before the grantee could be reached by the mortgagee.

This is the rule of Common Law.

This is the rule in England.

Waring vs. Ward, 7 Ves. Jr. 332.

Oxford vs. Rodney, 14 Ves. Jr. 417.

Woods vs. Huntingford, 3 Ves. Jr. 128.

There is no Statute in Arizona announcing the rule, hence, the Courts of Arizona, the Inferior Courts, are under the direct supervision of the Supreme Court of the United States, the rules announced by the Supreme Courts of the United States as a Court of last resort from the decisions of the Courts of Arizona are binding upon the Supreme Courts of Arizona, and appellants most seriously contend that the Supreme Court of Arizona erred and disregarded settled law and the decisions of the Supreme Court of the United States on the questions here contended for; as well as the statutes of Arizona.

The statute of Arizona, however, is ample in all such cases as this to reach a debtor's debtor. How? By garnishment. Garnishee it. Garnishments may issue under the statute of Arizona. Page 62, par. 72, subdivision 2, is as follows: "Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid and that the defendant has not within his knowledge property in his possession, within this territory subject to execution, sufficient to satisfy such debt, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee."

Subdivision 3: "Where the plaintiff has a judgment and makes affidavit that the defendant has not within his knowledge property in his possession within this territory subject to execution sufficient to satisfy such judgment."

These provisions are ample to reach the so-called contract of assumption. Why was it not invoked, because the mortgagor has over $30,000 worth of real estate here in the jurisdiction of the Court in his possession and appellee would have to commit perjury to invoke these statutes upon which he would have been arrested immediately. Well it is said, even if this statute is ample by garnishment, how could this party bring in the parties that he refused to make parties to his first suit? The statute is also ample on that point. Serve them with process or inform the Court by motion and the Court will order them served and brought in.

Revised Statutes of Arizona at page 170, Par. 689, Sec 41, is as follows: "Additional parties may be brought in by proper process either by plaintiff or defendant upon such terms as the court may prescribe."

Has this appellee ever attempted to bring in these parties under the rules prescribed by the statute? No, he attempts to escape it all by saying he was deceived by some one, asserts some one is conspiring against him. Such a charge is a subterfuge and rotten. Why? W. A. Daggs, the tenant, was admittedly living openly and notoriously on the land. He was not made a party. Appellee never made him party to his first suit and appellee says the tenant claimd and asserted when he filed his last suit that he was Johns' tenant. It is also admitted that Johns placed his deed on the records only two days after his first suit was filed. Then he had not only actual, but constructive notice of Johns' title. Why did he not move under the statute to bring him in? Why? Why? Why?

This is a case where a mortgagee is refusing to receive his so-called claim from his mortgagor, his only debtor, and attempting to enforce an alleged assumption of his claim, which assumption is denied. Now mark this appellee is here attempting to enforce an alleged contract that his mortgagor, his debtor, could not enforce. Why? Because the mortgagor warranted and agreed to defend this property against all claims whatsoever, and if the mortgagor should sue his grantee he would be met immediately by the grantee's answer, who would say: "I paid you the cash to pay this claim and you agreed to warrant and defend the title to the property." Now under such circumstances, how could the mortgagor enforce this so-called assumption? He would fail. Now, how can this mortgagee have the right to

found an action on alleged contract and recover on it that the party thereto cannot enforce? This is the first case of this kind in Arizona, and it is seen that no such a proceeding exists under the laws of Arizona. No such a proceeding existed at common law or equity. The actual contractual debtor must be completely exhausted, then by showing all these facts to the Court and show the Court his suit, would not be a vexatious and harassing one. The Court would allow him to sue in the name of the mortgagor to reach an asset of the mortgagor. Here no asset exists.

Revised Statutes of Arizona, Par. 2935, is as follows: "The common law of England so far only as is consistent with and adapted to the natural and physical conditions of this territory, and the necessities of the people thereof and not repugnant to or inconsistent with the Constitution of the United States, or bill of rights or laws of this Territory or established customs of the people of this Territory is hereby adopted and shall be the rule of decision by all the courts of this Territory."

This case has been on the rough side from its inception for legal consideration. The court of first instance was presided over by an ex-minister of the gospel. When it reached the Supreme Court of Arizona it fell into the hands of another ecclesiastic, fresh from the circuits, and an examination of his opinion on the points here under discussion, it will at once be seen that he never understood the subject at all. He seemed to think that the only question before him was "a mere matter of procedure" and governed by the *lex fori*." This language was grappled from 9 Am. Eng. Ency., Pleadings and Practice, 467 and 8, and that there was no question about the *gist* of the action at all. He does not seem to have ever understood that the right must precede the remedy, and that under whatever plan of procedure the case is laid, the bill must show the *existence* of the gist, the *right to recover* or there was no *cause of action*. The principle governing these propositions have never been changed by the code. They do not depend on the remedy. They must exist before any remedy can be applied. The bill must show privity of contract, in every case, of suit upon contract, some consideration must have passed between the contractual parties. In this action he must go further and show, first, that he has exhausted the mortgagor, second, that he is notoriously insolvent and it would be useless to pursue him; third, that his judgment is ineffectual against the mortgagee; fourth, that the property is entirely inadequate to meet his demand, having already exhausted it, therefore the Supreme Courts of Arizona

erred in holding that an action could me maintained by a mortgage directly against the grantee of his mortgagor.

The appellants also contend that the Supreme Court of Arizona, as well as the District Courts thereof, are bound to exercise the rules of decision, as they are understood at Common Law and in equity, where no statute conflicts; because the Congress of the United States clothed them with Chancery and Common Law jurisdiction.

The Organic Act, Revised Statutes of the United States, Sec. 1868, is as follows:

"The Supreme Court and the District Court, respectively, of every Territory, shall possess chancery as well as common law jurisdiction."

The Common Law is expressly made to rule a decision in Arizona by legislative enactment when there is no statute in conflict therewith.

The appellants therefore respectively submit that the error here urged is also fatal to the contention of the appellee. That he has no cause of action whatever, if what he says by his bill is true. And inasmuch as he does not allege in his bill that the mortgagor has been exhausted in any manner or at all, or that he is in any manner insolvent, and shows no privity of contract and shows in no manner that his first judgment is insufficient. That no cause of action exists.. This action presents a case where a mortgagor is refusing to get his claim from his debtor and is following after a remote right of his mortgagor if it was clear that the two grantees had assumed and agreed to pay his alleged claim, which is denied. Appellants contend that the alleged claim is paid and that collusion is going on between the mort gagor and mortgagee and that they are simply gambling before the courts.

Under these assignments it is suggested that the complaint of the appellee does not show affirmation or in any way that he cannot obtain full and complete satisfaction out of his alleged first foreclosure suit, for in his bill alleges that he has judgment, but he does not say once that he ever issued execution, or that the said John S. Armstrong is not perfectly responsible; and perfectly solvent ,in fact, he is eliminated from this suit; neither does he say or show that the sheriff has ever had an opportunity to reach the mortgagoror or his property by an execution, and so far as this bill shows, the judgment is sufficient, and that the prosecution of this suit is merely vexatious.

The real estate mortgage Statute of Arizona was taken from California. In the case of Aldrich vs. Stephens, 49th Cal. 675, and the Supreme Court of California said:

"There was certainly no reason for a second decree unless the first was shown to be in some respects ineffectual to afford the relief claimed by the plaintiff."

To sustain this contention we revert again to the Statute of Arizona. Under its procedure there is no such a thing as a deficiency judgment:

Rev. Stat. of A. T., Par. 797: "Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt damages and costs with a foreclosure of the plaintiff's lien on the property subject thereto," etc.

The learned ecclesiast who wrote the opinion below, after grappling his entire statement from the so-called "complaint" in the nature of a bill in equity, which he calls "record disclosures" and upbolstered that statement with his own injections such as "the record was searched" and "supposedly as the tenant of R. E. Daggs," and "*lispendens* was filed," and that the property was "bid in by the plaintiff," which complaint his Honor took to be absolutely true without proof, or notice of the facts well plead, as well as the injections he makes himself. He then proceeds to base his opinion on the law of those jurisdictions where a deficiency judgment obtains. In Arizona a personal judgment is first taken against the debtor. The complainant can stop right there if he desires, take out his general execution and proceed to sell any piece of the proprty of th dbtor, bcause th debt is mergd by the statute into a judgment lien which covers all the property of the debtor; and if the debtor still owns the mortgaged property he can seize and sell that as well, with his general execution, and there is nothing that will require him to proceed against the mortgaged property first, or sell it, and bring the proceeds of the sale into court, and then have a deficiency judgment rendered against the debtor, upon which deficiency judgment he could take out for the first time an execution, no such practice in Arizona.

That deficiency judgment practice exists in California where the learned gentleman below says the procedure in "our courts" "is distinctly authorized" and says: "The rule is very plainly stated and the *reasons* supporting it given in *Williams vs. Noftzger, 37 Pac. 411.* His Honor then quotes three bald statements of "*abiter dictum*," from the decision, about which the Supreme Court of California itself said: "The appellants, however, *do not controvert this proposition*, but urge in support of their appeal" certain evidence insufficient to support a certain finding, and thus to the learned writer below statements of *abiter dictum* becomes controlling rules of sound reasons "distinctly authorized" by *our courts.*

He also quoted a small quotation from *Keller vs. Ashford, 133 U. S. 610*, where this court in such quotation spoke only about the remedy and said nothing about the gist of the action.

We deny the assertion that the mortgagee has any interest in such a contract except as that right existed in equity as a mere remote asset of his mortgagor or except the right to garnishee a debtor under the statute or code. He gains nor loses nothing by it. He has no part in making it and is a stranger to the consideration. If the grantee of the moragagor owes the mortgagor upon this contract, under the statute he can be garnished. The statute furnishes no other remedy. This is ample and can be enforced at the ame time he sues, or any time. We take issue with those who say the grantee is a principal debtor, such assertion but shows an effort on the part of those who assume to have found something new in the code, a new rule of Commercial law. It is not a contract made for the benefit of another but the mortgagor, and with him alone. He alone can gain or loose by it. No other. This is the settled rules of law, Aside from this it opens the door to fraud to say it is a contract made for the benefit of another, and he can enforce it without the mortgagor. Possibly he would have a defense against the mortgagee. Could it be invoked against the mortgagee? The mortgagor and mortgagee can colude and beat the grantee, or stir up a multiplicity of suits. We denounce it as sloppy practice, false logic and false law, attempted to be injected in to break down the statute to no purpose and to one's benefit.

ASSIGNMENT OF ERROR NO. 6 AND 7.

THE COURT ERRED IN OVERRULING THE SPECIAL DEMURRERS OF APPELLANTS ON THE GROUND THAT: NO. 6—"NO REASON IS SHOWN WHY W. A. DAGGS AND A. L. JOHNS WERE NOT MADE PARTIES TO THE ORIGINAL ACTION." NO. 7—"THAT NO REASON IS SHOWN FOR NOT APPLYING FOR RELIEF IN THE FORMER FORECLOSURE SUIT," AND AS A CONSEQUENCE APPELLEE HAS NO LEGAL RIGHT TO A SO-CALLED SECOND FORECLOSURE TO THEIR INJURY.

The appellee alleged that W. A. Daggs was living upon the land in open and notorious possession, yet the appellee made no effort whatever to ascertain whether he was the owner of the property or the tenant or why he was there;

that being an admitted fact, the appellee, when he brought his original foreclosure suit, he had complete notice that the property belonged to the landlord of W. A. Daggs just as much as if A. L. Johns' deed had been upon the record.

Jones on Mortgages (5th Edition), Vol. 1,
Par. 586-87-89, and the cases there cited.

The doctrine is well settled, that where a party is in open and notorious possession of the property that it is the duty of those dealing with the title to that property to ascertain what they are doing there, and what their title is.

Phelan vs. Brady, 23 North Eastern 1100, where the Supreme Court of New York said:

"At the time of the execution and delivery of the mortgage to the plaintiff, the defendant, Mrs. Brady, was in the actual possession of the premises under a perfectly valid, but unrecorded deed. Nor is it of any consequence so far as this question is concerned whether the plaintiff was in fact ignorant of any right or claim of Mrs. Brady to the premises. It was enough that she was in possession under her deed. As that fact operated in law, as notice to the plaintiff of all her rights. Actual possession of real estate is sufficient to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish."

Again, in the late case of *Allen vs. Caldwell (Mich.), 20th N. W. 694-95*, the Court said:

"Complainant was in possession of premises at the same time defendant purchased, and although the deed to complainant was not then recorded, yet defendant could not have but known that the complainant claimed to have some interest in the premises. He should, therefore, have called upon her and ascertained the extent of the interest which she claimed therein, and from what source she derived her title; failing to do so, he is chargeable, the same as though he had called upon her and fully ascertained all the facts.

"The law is too well settled to need any extended citations of authorities, that actual possession of real estate is notice to purchasers or incumbrancers of the claim of those in possession."

2, Smith's Leading Cases, 180.
And Authority Cited.

1, Jones on Mortgages, Par. 255, 591 and *592.*

It is immaterial whether Wilson knew that Johns was in possession or not. Johns' actual possession by himself and tenant would be notice to him just the same. He cannot now shield his scheme and subterfuge behind an assertion of ignorance to the injury of A. L. Johns, R. E. Daggs and W. A. Daggs.

Jones on Mortgages (5th Edition), Vol. I, Par. 587. And Cases there Noted.

It will be observed that it is charged in the complaint that A. L. Johns went into the possession of this property without giving the appellee any notice thereof.

It would be a strange doctrine indeed that every time real property changed hands that the purchaser must go about and hunt every person who had a claim or a pretended claim and give him notice that he was going into possession and upon failure to so do it would work a forfeiture of his deed.

We can find no such doctrine asserted in the book.

In the case of *Hodges vs. Amerman (N. J.), 2 A. P. L. 260*, it is said on this point:

"But it is not necessary, in order to establish the fact of notice in such case, to show that the person to be affected by the notice knew of the possession of the other. If the possession of the other is of the character required by law; if this possession has the notoriety, certainty, conclusiveness which the law says shall constitute notice; then notice is the legal deduction from the fact of possession, and all persons dealing with the title to the land in his possession are chargeable with notice of his possession, whether they have actual knowledge of his possession or not. The reason of the rule is this: That it is the duty of the person who proposes to deal respecting the title to the particular tract of land to ascertain in advance who is in possession of it; and if he neglects this duty it is only just that he should be charged with the knowledge that he would have obtained had he performed it."

At this point reverting to the opinion of his Honor below, where he says: "This suit is brought for the purpose of *foreclosing* the *mortgage* against one who was not a party to the former suit and whose non-joinder as a party in a former suit is explained in the pleadings herein by the *ignorance* of the plaintiff of said defendant's interest in the *suit or title to the property;* and that ignorance is further explained by the allegation in the pleading that upon the conspiracy and connivance of the said defendant and other defendants

who are joined with him, all the interest of the said defendant in the suit and the claim of title to the premises on the part of the said defendant was purposely and fraudulently *withheld* from the knowledge of the plaintiff and such fraudulent concealment of fact on the part of the defendants accounted for the non-joinder in the former suit of such defendant by the plaintiff herein."

In view of the appellee bill this is an appalling statement. The appellee in his hodge podge complaint, says: "Plaintiff further shows that the said W. A. Daggs, *who had heretofore been in possession of said premises as the tenant of said R. E. Daggs* in pursuance of said conspiracy as aforesaid at or about the time of *recording the said deed to said Johns*, to-wit, on the *28th day of April, 1894, claimed and asserted to have abandoned said premises* and property as the tenant of R. E. Daggs, on or about the first day of April, 1894, and thereupon to have become the tenant of said A. L. Jotns and to have thereupon taken possession thereof for said Johns." (R. P. 5 F. 10.) He must have seen W. A. Daggs face to face at that time, April 28, 1894, only two days after he filed his first complaint, and on the same day A. L. Johns' deed was filed for record and W. A. Daggs, he says, "asserted" that he was not R. E. Daggs' tenant, but A. L. Johns' tenant. Appellee then and there had actual as well as constructive notice of Johns' deed, as well as Daggs' tenancy under him. What more is there on earth to be done to give legal notice or moral notice of the rights of A. L. Johns or W. A. Daggs? Daggs, he admits and alleges, said to him, looked him in the face, and *claimed, asserted* and told him: "I am not the tenant of R. E. Daggs and have not been since April 1st, 1894. I am the tenant of A. L. Johns, whose deed is over there in the recorder's office of record." Yet appellee boldly asserts that he was *deceived* by such secret change of possession and had no notice of either A. L. Johns' or W. A. Daggs' rights and therefore he did not make them parties, and appellants say that there is not an authority from the year books down to the present time except the learned opinion of the court below that holds under circumstances like this that the parties were not charged with full and complete notice, and are guilty of open and intentional negligence; in fact, a positive refusal to make the appellants parties. Appellee did not then care for any other than the mortgagor. He knew by the contracts of the parties the mortgagor had received the money to pay his claim from R. E. Daggs and had warranted the latter against his claim and was a rich man. And there is nothing now to prevent him getting his claim by ordinary execution against the mortgagor. But he has changed front for some

reason. We charge collusion on this point. The learned writer below cites and bases his opinion on the case of *Brocker vs. Banegas, 48 Pac., page 90 (Cal.)*, which case involved a reforeclosure against a wife upon community proper after declaration of homestead had been filed, and the plaintiff had ebployed an expert to examine th records bfore bringing his first foreclosure, which expert had overlooked the declaration of homestead by the husband and wife, and the foreclosure was therefore taken against the husband alone. Upon the showing of these facts the Court allowed a reforeclosure against the wife, and held that the original debtor was not injured thereby, for the only thing asked against him was the same judgment originally recovered, without costs or interest, or attorney fees. Is this the case here? No. The mortgagor is not before the court, and while he says he has one judgment against R. E. Daggs, in his bill his prayer here is "wherefore plaintiff prays that he have judgment against R. E. Daggs and A. L. Johns * * for the sum of six thousand five hundred dollars, with interest thereon from the 24th day of April, 1893, at the rate of 8 per cent and 10 per cent attorney fees upon the principal sum and also for the sum paid for taxes and insurance, and against said R. E. Daggs, A. J. Daggs, W. A. Daggs and A. L. Johns for the sum of $1,000, his *additional* damages by reason of the premises stated as aforesaid, besides the costs of this action." There is no point in which these cases are parallel. (If we could revert to the judgment rendered it shows that he took a double money judgment against R. E. E. Daggs, who under his contract, his deed paid the claim once. That while he took also a double money judgment against A. L. Johns, who had paid for the property in full, and set his deed aside as well and sent him out empty handed, yet such slaughter is said to be upheld by the case cited.)

The court in that case also held that as long as the right by motion existed equity could not interfere to bring in parties, but when that right expired and no lack or want of diligence could be imputed to the party asking relief, equity could interfere. Now apply this rule in this case. Appellee, although he knew and says himself in his bill that the tenant asserted to his face two days after his suit was filed that he was Johns' tenant and A. L. Johns' deed was of record, yet appellee did not make his motion under the statutes of Arizona to bring them in as parties, but deliberately went to judgment against the mortgagor, which judgment is perfectly valid and collectable, but appellee refuses to pursue him. Now appellee waits a year and three months and charges that he was deceived by a secret change of possession of W. A. Daggs. Now is it not a lit-

tle singular that W. A. Daggs was not made a party to hi. first suit? He says he knew he was tenant of R. E. Daggs and now pretends to claim that W. A. Daggs deceived him by making a *secret change of possession*. Why did he not make him party to his first suit? Appellee has no standing under the case cited by the learned court below to support him. Now, further, we find this language in case cited by His Honor. After saying that the defendants there were not injured by a reforeclosure and that it was a mistake of fact, without negligence, said, to-wit: "Appellants argue at some length the doctrine that the record imparted notice to plaintiff and therefore there is a conclusive presumption of notice on his part as to the homestead having been declared. *This doctrine is correct when applied to purchasers or lienholders* upon the property who will be *injured* by the assertion of ignorance as to the record, but is not applicable to a case like the present; and held that "the status of the husband and wife as to the homestead is *sui generis*." It now, therefore, appears that this case is neither coincident or remotely parallel either in fact or law with the case of appellee before this Court, but is in favor of appellant. That while the Court in that case admits that the rule is correct where applied to a *purchaser* or lienholder, it holds that those with whom they were concerned were neother, but a homestead declarent while the case at bar are *purchaser*. Will they be injured? They have simply been slaughtered. While R. E. Daggs is sued twice with a double judgment against him, after he paid for the property in full, A. L. Johns is ground down by two judgments against him and his deed set aside, too. They simply burnt him up. Yet the very learned gentleman below *is willing* to say: "The right to a second or supplemental foreclosure of interests without negligence or due diligence on the part of the plaintiff is fully sustained by our courts."

The Statute of Arizona makes specific provisions for bringing in parties, if it is desired to do so, and that while the bill alleges that A. L. Johns placed his deeds upon record two days after he filed his alleged first foreclosure complaint, that then he must have had knowledge, not only and through the tenant, but by the record of the deed of A. L. Johns; and should the appellee have desired desired to make Johns a party he could have done so under Par. 689, Sec. 41, Revised Statutes of Arizona, which is as follows:

"Additional parties may be brought in by process, either by plaintiff or defendant, but upon such terms as the Court may prescribe."

Appellee did not desire then to bring in these people; he was after the mortgagor.

Again, under Sec. 727, Revised Statutes of Arizona Territory, says:

"The Court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court shall order them to be brought in."

It is thus seen that the appellee negligently and intentionally proceeded to judgment without making A. L. Johns or his tenant a party to his so-called foreclosure suit, and to hide his scheme ———— attacks the appellants and says their conspiracy by secret transfer of possession deceived him. Where is there any room for a court of equity to interfere? Appellee refused there to help himself; refused to bring these parties in his first suit; refuses to enforce his first judgment against the mortgagor, or R. E. Daggs; refuses to try to get possession of the property by writ of assistance; refuses to follow the statute made and provided for him, and which is ample in all such cases. Where is any semblance of a ground for the interference of a court of equity?

If he has any rights he should have, and must have proceeded at the proper time, and in the proper Court, and not having done so, cannot now proceed by a eparsate bill, wherein the case of *Goodenow vs. Ewer, 16 Cal. 461*, the late learned Justice Field of this Court, while he was Chief Justice of the Supreme Court of California, laid down the practice in cases of this kind, and said:

"That no excuse is offered for *neglecting* to apply for relief in the original foreclosure suit."

Boggs vs. Hargrave, 16 Cal. 566.
Kreichbaum vs. Melton, 49 Cal. 50.
Aldrich vs. Stephens, 49 Cal. 676.

We therefore respectfully say, upon these assignments, that the remedy of the appellee was by motion in the original suit, not by separate action attempting to foreclose a mortgage, against the damage arising or purporting to arise from the alleged breach of the contract of *assumption*. This Court will therefore dismiss this action and order restitution as no such an action exists in the Territory of Arizona.

ASSIGNMENT OF ERROR NO. 8.

THE COURT ERRED IN OVERRULING DEMURRER OF A. L. JOHNS AND R. E. DAGGS ON

THE GROUND "THAT NO REASON IS SHOWN FOR A SECOND DECREE; NO REASON BEING SHOWN WHY PLAINTIFF COULD NOT COLLECT HIS ALLEGED DEBT ON HIS FORMER JUDGMENT AGAINST THE MORTGAGOR AND R. E. DAGGS."

In the case of Aldrich vs. Stephens, 49 Cal. 676, it was held in a suit wherein it was sought to obtain a second decree by a second foreclosure precisely as here, and upon a demurrer the Court said:

"There was certainly no necessity for a second decree, the first one not having shown to be in some respects ineffectual to afford the relief claimed by the plaintiff," and sustained the demurrer; and the Court also said in the same action that if relief was to be attained at all it could be reached only in such cases by a motion in the original suit.

Goodenow vs. Ewer, 16 Cal. 461 Supra.

Why is the appellee entitled to maintain this action when he shows by his bill that he is refusing to pursue the mortgagor? Why should a second decree be entered? It is as much the province of a court to suppress unfounded litigation as it is to maintain such as is well grounded. We ask that appellee be put to his first judgment.

ASSIGNMENT OF ERROR NO. 9.

THE COURT ERRED IN NOT SUSTAINING THE SPECIAL DEMURRER OF JOHNS AND DAGGS ON THE GROUND "THAT THE MORTGAGOR IS NOT BEFORE THE COURT."

In an action to foreclose a mortgage where it is shown as here that the mortgagor it not before the Court and that he still owns property covered by the mortgage (the city lots) is he not a proper party? Is it bad faith on the part of the appellee, or collusion between the mortgagor and mortgagee? Is the Court doing piecemeal foreclosing? Is is unnecssary to cite authorities to show that a mortgagor is a necessary party to a foreclosure suit, where he owns property covered by the mortgage as here and a foreclosure is sought against it

Daniel vs. Sutton, 20 Fed. Rep. 787.

This rule has been held good, even though the mortgagor's property had been confiscated, and his title divested by proceedings on the part of the government of the United States.

Arcgno vs. Schmidt, 113 U. S. 293.

We claim there is merit in this assignment and the Honorable Court should sustain this contention.

ASSIGNMENT OF ERROR NO. 10.

THE COURT ERRED IN NOT SUSTAINING THE SPECIAL DEMURRER OF A. L. JOHNS AND R. E. DAGGS ON THE GROUND "THAT NO SEPARATE ACTION CAN BE MAINTAINED ON A MORTGAGE AND JUDGMENT, IT BEING SHOWN TO HAVE ONCE MERGED IN JUDGMENT."

The doctrine of merger is elementary, and, so far as our research goes, we have not been able to find a respectable authority that holds, that when a cause of action is once merged in judgment the original cause of action retains its vitality, and remains a cause of action, but is merged in and becomes a higher security given by the state, a judgment.

Black on Judgments, Vol. 2, 674.
Freeman on Judgments (2nd Edition), 216.
Van Fleet's Former Judication, p. 95, Sec. 13.

The reason of the doctrine of merger is supported on the ground that the allowance of a new suit is a superfluous and vexatious encouragement to litigation injurious to the defendant and of no benefit to the plaintiff, and that it is a volunteer election by the plaintiff to transform his claim by judicial determination into a different claim, and therefore no second suit can be permitted.

We urge this ground of our contention upon the Honorable Court for consideration upon its merits.

Assignment No. 11 having been disposed of as assignment No. 1 in this brief under the head of misjoinder of causes of action, as well as assignment No. 12—being assignments urging misjoinder of causes as well as of parties, we ask attention to.

ASSIGNMENT OF ERROR NO. 13.

APPELLANTS CALL ATTENTION NEXT TO THE DEFECT IN THE COMPLAINT AS IT IS POINTED OUT BY THE APPELLANT, R. E. DAGGS, IN HIS THIRTEENTH ASSIGNMENT OF ERROR, CHARGED IN HIS SPECIAL DEMURRER, THAT THE COURT BELOW ERRED IN OVERRULING HIS SPECIAL DEMURRER ON THE GROUND

"THAT BECAUSE THE PLAINTIFF'S COMPLAINT SHOWS ON ITS FACE THAT HE ALREADY HAS JUDGMENT AGAINST THE APPELLANT, R. E. DAGGS, FOR THE SAME ALLEGED MORTGAGE THAT FORMS THE FOUNDATION OF THIS ACTION, IN THIS SUIT, IT IS THEREFORE RES JUDICATA AS TO HIM."

This defect appearing on the face of the complaint advantage may be taken of it by demurrer and the Court below should have sustained this demurrer, for the reason that if the appellee has already judgment against this appellant by virtue of the principles of law he is stopped from vexing and harrassing again this appellant upon the same matter; and when this appears on the face of his bill, and objection taken to it, this appellee is entitled to have his demurrer sustained.

Oregonion Railroad Co. vs. Oregon R. Etc. Co., 10th Sawy. Page 465.

1 Chitty Pl. (16th American Edition) Page 629.

Veale vs. Warner, 1 Saund. 329.

Hustler vs. Hayes, 3 Cal. 302.

Smith vs. Whittaker, 11 Ill. 418.

German Mut. Life Ins. Co. vs. Grim, 33 Ind. 249.

Crawford vs. Nolan, 70 Ia. 97.

Bartholemew vs. Candy, 14 Pick. (Mass.) 167.

ASSIGNMENT OF ERROR NO. 14.

THE COURT BELOW ERRED IN OVERRULING THE SPECIAL DEMURRERS OF A. L. JOHNS AND R. E. DAGGS ON THE GROUND "THAT BECAUSE THE APPELLEE HAS MADE A MISTAKE OF LAW, AND RELIED UPON HIS FIRST AND FORMER DECREE, THE COURT WAS THEREFORE WITHOUT JURISDICTION TO GRANT RELIEF IN A SECOND ACTION."

We beg to assert that we consider this objection in this assignment fatal to the contentions and right of the appellee to prosecute a second action, having shown on the face of his bill thart he deliberately brought his first action and relied upon his decree, and it is not alleged or shown that his decree is ineffectual in any manner; and he also alleges that

he filed a Lis Pendens one day after his bill was filed, by which we assume he sought to cut off all right of appellant, A. L. Johns.

The question, however, is: having deliberated his action, with full notice of the right of A. L. Johns, by and through his tenant being in open and notorious possession of the property and thereby notice of the rights of A. L. Johns, and also by the filing of the deed of A. L. Johns two days after his first action was commenced, and also by his allegation that on the 28th day of April, 1894, W. A. Daggs, the tenant then claimed and asserted to him that he was not the tenant of R. E. Daggs but of A. L. Johns, with this knowledge and facts before him, he proceeded deliberately to judgment, without making Johns or his tenant a party to the action; and in such a case, if he has made any mistake wahtever, it is a mistake of law for that appellee had full knowledge of all the facts in existence and so says by his bill and a Court of Equity has no power or jurisdiction to grant relief.

Under the statute and code of Arizona Territory the lien of the mortgage is a mere cumulative right to the right to issue execution upon the personal judgment upon the notes, which personal judgment is always in every case, taken in the first instance which becomes a judgment lien on all the property of the judgment.

Rev. Stat. Ariz. Ter., Par. 2253 is as follows, to-wit:

"When any judgment has been recorded and indexed, as provided in the preceding sections, it shall from the date of such record and index operate as a lien upon all the real estate of the defendant situated in the county where such record and index are made, and upon all real estate which the defendant may thereafter acquire situated in said county."

See Revised Statutes of Arizona 797.

"Judgments for the foreclosures of mortgages and other liens shall be that the ***plaintiff recover his debt***, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and * * * that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant as in case of ordinary execution."

It is seen that a personal judgment is entered first under this statute where the payee of the notes chooses even to foreclose the mortgage lien.

The payee of the notes can (and it is more often done) take a plain judgment on the notes and then take a general execution against the payor and reach personal as well as real property. And the mortgage lien is a mere cumulative lien to his judgment lien, which judgment lien covers all the debtor's property, whereas the mortgage lien covers only a specific portion thereof.

A mortgage is a mere lien in Arizona, whatever its terms.

Revised Statutes of Arizona, 3155. (Same hereinbefore quoted.)

That the Court has no power or jurisdiction to relieve the plaintiff here from his deliberate mistake of law.

Goodenow vs. Ewer, 16 Cal. 461, where it is said: Such a mistake is a mistake of law.

"As a general rule, the purchaser will be released and a resale ordered or such new and additional proceedings as may obviate the objection arising from those originally taken when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, there would seem to be no just reason why the ordinary rule as to mistakes of law should not apply. From the consequences of this class of mistakes, courts of equity seldom relieve, as we have already stated. Indeed the weight of authority in the United States is that the mistake, unless accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence, constitutes no ground for relief.

"It may be safely affirmed (says Mr. Justice Story) upon the highest authority, as a well established doctrine that a naked mistake of law, unattended with any special circumstances, (such as misplaced confidence, misrepresentation or undue influence) will furnish no ground for the interposition of a Court of Equity; and the present disposition of Courts of Equity is to narrow rather than to enlarge the operation of exceptions."

Storey's Equity, Sec. 138.

Snell vs. Atlondice F. & M. Ins. Co. 98 U. S. 85.

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Bank of the U. S. vs. Daniel 12 Pet. 618.

Where, in the case here cited, this Court laid down the doctrine:

"That a Court of equity *cannot* grant relief against a mistake of law."

And as was said also in Goodenow vs. Ewer, supra:

"No excuse is offered for neglecting to apply for relief in the original foreclosure suit."

"Besides these considerations the present action is not brought for relief from the sale, but is brought for another purpose, and Downer (the mortgagor as here John S. Armstrong the mortgagor) is not a party before the court."

In Lynch vs. Richmond, 2 John N. Y. 60, Chancellor kent said:

"The Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though under a mistake of the law. Every man is to be charged at his peril ,with a full knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."

Crozier vs. Acre 7 Paige, N. Y. 137-143.
Zellman vs. More, 21 Grat. Va. 113.

For that it is a maxim "that ignorance of the law excuses no man."

It is charged in the plaintiff's bill that the appellant, A. L. Johns, withheld his deed from the record until two days after he had brought his foreclosure suit, and then placed the deed upon record, which deed is of date March 17th, 1894, and the suit was brought on the 26th of April, 1894; and appellant, Johns" deed was placed on record April 28th, 1894; while, during all this time the tenant of A. L. Johns (W. A. Daggs) was living in open and notorious possession of the property, and W. A. Daggs, the tenant, claimed and asserted on the 28th day of April, 1894, to the appellee, that he was Johns' tenant, appellee being told this to his face, and Johns' deed being on record, why should he not know? Still, the appellee charges that he was the victim of fraud, because Johns withheld the deed from record; and that he proceeded to judgment, sale, etc., and that that was a sufficient excuse for him not making Johns a party. He knew of it all. He could have brought them in. He did not do it. Why? He had nothing to obtain but his decree. He must have relied on that, and his lis pendeus against John

S. Armstrong and R. E. Daggs. He was not deceived. He could not have been deceived. He knew personally, actually and constructively, all there was or is to know at the time he brought his first bill. The truth is, he relied upon his foreclosure suit, and, as we have shown, he simply made a mistake of law.

As to him being a victim of fraud by the withholding of the deed by Johns, or any one else, such an act is not a fraud, and instead of it being a fraud it is an attempt by the plaintiff to plead his own subterfuge to shield his scheme, and to reap from his own wrong.

In Boggs vs. Hargrave, 16 Cal. 599, reading page 565, where the question came up as to the withholding of a deed precisely as is charged by the appellee, and the late Justice Field of this Court, while Chief Justice of the Supreme Court of California, in rendering that opinion, said:

"The plaintiff was aware at the time of his bid, of the existence of the deeds to Bristol. It was the subject of *conversation between him and the attorney of the mortgagee, previous to the sale. It was executed before the commencement of the foreclosure suit, and was on record prior to the sale. There was no fraudulent misrepresentation to induce the purchase. The facts were all within his knowledge, or might have been. The record would have informed him of the date of the execution of the deed, and his neglect to avail himself of this accessible means of information takes from his claim all title to favorable consideration on that ground.* It is evident that the plaintiff did not attach any importance to the existence of the deed, and his bid was made upon a mistake of law as to the effect of the decree; and the real question presented is: Whether for money paid, under these circumstances, the present action will lie? We are clear that it will not."

In the case at bar appellee pleads that two days after he filed his first action the tenant claimed and asserted that he was the tenant of A. L. Johns and not the tenant of R. E. Daggs. The deed of A. L. Johns was also on record, still, here, he proceeded on deliberately to judgment, and relied solely upon his decree, and now springs up without even trying to exhaust the mortgagor and claimed he was misled by the fraud of those who told him face to face of the very thing he complains.

Reverting again to the opinion below on the point here under discussion they admit that the "*authorities quoted* fully sustain the doctrine laid down by Justice Storey, that "a naked mistake of law, etc., will not furnish grounds for in-

terference of equity and that the tendency is to enlarge rather than enlarge the exception."

They then say: "This doctrine, however, refers to cases where a mistake of law has occurred, *where the facts are known* and no fraud or deceit has been practiced, whereas in this instance the relief is asked on the ground of mistake in fact as well as law and for which mistake the fraud and deceit of the defendants are alleged in the pleadings to be responsible."

Apparently as an apology for the above statement the learned writer in a doubtful manner says: "In the case at bar *if any mistake of law was made*, it was certainly induced by the fraudulent withholding from the record of the deed from Daggs to Johns *until after the records were searched*, the foreclosure suit begun, and the lis pendens had been filed."

The most scrutinizing search of this entire record will fail to disclose in any manner, shape or form that this appellee ever searched any records in this case and we cannot account for such volunteer statements on the part of the court below; again, at the same time, the learned writer below forgot that in his garbilation of facts from the appellee's bill he had said in the first of his statement, speaking of the time of filing of appellee's bill—"At this time the defendant, W. A. Daggs, was in *possession* of the premises *supposedly* as the tenant of R. E. Daggs."

W. A. Daggs, the tenant, is then guilty of a fraudulent secret change of possession because he was on the premises open and notorious, but was not there *supposedly* as the tenant of R. E. Daggs. He was not made a party to the first suit.

The learned ecclesiast also forgot that appellee's bill makes this statement, to-wit:

"Plaintiff further shows that W. A. Daggs, who had heretofore been in possession of said premises as tenant of R. E. Daggs, in pursuance of said conspiracy as aforesaid, *at or about the time of recording of said deed to said Johns, to-wit: on the 28th day of April, 1894, CLAIMED and ASSERTED to have abandoned* said premises and property as the the tenant of said R. E. Daggs on or about the 1st day of April, 1894, and thereupon to have become the tenant of A. L. Johns."

This clause of appellee bill shows that he knew that *on or about* the 28th day of April, 1894, W. A. Daggs claimed and asserted himself to be the tenant of A. L. Johns. He

does not allege that he is informed that W. A. Daggs, the tenant, claimed and asserted, but alleges positively that he did. Now the very Honorable Court below has the coolness to say the facts were not known and that fraud and deceit were practiced, and injects into this case that the records were searched.

The appellee alleges that he did know the facts and the court below says he didn't know the facts. This paradoxical position between the court and appellee is strengthened and climaxes in the further statement furnished by the court that the *records were searched* by appellee.

The allegation of appellee shows that he did not search the records, but filed his suit on April 26th, 1894, his lis pendens April 27th, 1894, and on or about April 28th, 1894, the day Johns filed his deed, did search W. A. Daggs, who claimed and asserted to appellee's face that he was not R. E. Daggs' tenant, nor hadn't been since April 1st, 1894, but was tenant of A. L. Johns. Appellee further alleges that these parties should have come to him and give him notice. They didn't know he was going to sue. The note fell due on Saturday and he sued on Monday. Appellee lives in Chicago.

This covers the dispute on this point that appellee deliberately went to judgment and foreclosure in his first suit with a full knowledge of all the facts by both verbal and record notice of the rights of A. L. Johns and W. A. Daggs. He cared nothing for them. His decree was what he must have relied upon. What else was he relying on, or going to rely on? This being true leaves nothing before this court but a bald mistake of law made by appellee as to these appellants. The court has no power to reach him. It has no jurisdiction over these appellant's. It must leave appellee where he started, and revert him to his first judgments, which are ample, and which he is refusing to follow.

The Honorable Court can neither help the appellee nor injure him by sustaining this ground of demurrer. He can get his debt, if he has any, from the judgments he has, and the appellants will thereby be saved from the havoc and slaughter that this record shows they have and will sustain if this judgment is allowed to stand.

Again, appellants, disposing first of the special demurrers, now call attention to the general demurrers of W. A. Daggs and A. J. Daggs, which struck at the so-called action of conspiracy to cheat and defraud by general demurrer, and the demurrer being overruled by court of first instance was assigned in court below as error and held immaterial or un-

important, is reassigned here for consideration. The point here goes to the substance of the cause of action for conspiracy and can be raised at any time, even in the court of last resort, and appellants R. E. Daggs and A. L. Johns join with their co-appellants, and all assign.

ASSIGNMENT OF ERROR NO. 15 A.

"THAT THE COURT BELOW ERRED IN OVERRULING THE GENERAL DEMURRER OF APPELLANTS ON THE GROUND THAT THE BILL DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR CONSPIRACY TO CHEAT AND DEFRAUD, AS AGAINST ALL OR ANY OF THEM."

It is alleged in the bill "that about the time of the coming due of appellee debt R. E. Daggs and A. J. Daggs --A. J. Daggs acting as agent of R. E. Daggs—conspiring together to *hinder, delay and obstruct* plaintiff in the collection of his said mortgage debt procured and caused a deed of conveyance of said property to *and the whole* thereof (the city lots were never conveyed) to be executed by said R. E. Daggs, purporting to convey said property and the whole thereof to the defendant A. L. Johns, who was alleged to reside at the city of Chicago in the state of Illinois, the said A. J. Daggs acting as the agent of said R. E. Daggs in making such pretended transfer; "That said deed of conveyance was dated on the 17th day of March, 1894, but the same was withheld from record until the 28th day of April, 1894, after the summons in said action aforesaid had been served upon said R. E. Daggs and two days after said *lis pendens* had been filed and plaintiff shows that *he is informed* and verily believes that the same was during all said time in the control of said R. E. Daggs and his agent, A. J. Daggs, and was withheld from the record until after said lis pendens was filed and said suit was commenced for the purpose of humbug and delaying this plaintiff in the collection of his said mortgage debt, and to cheat and defraud this plaintiff."

"That in and by said deed to A. L. Johns aforesaid, said A. L. Johns expressly agreed and bound himself to pay plaintiff's mortgage debt as aforesaid, but said Johns allowed said deed to be withheld from record as aforesaid until after said action was commenced and neither paid said debt or any interest thereon or made any inquiry of plaintiff in regard thereto, although he well knew said debt was due and payable on the 24th day of April, 1894, and plaintiff alleges on

information and belief that said Johns paid nothing whatsoever for said conveyance and that R. E. Daggs remained in control of and the actual owner of said premises by secret trust notwithstanding said conveyance."

"Plaintiff further shows that the said W. A. Daggs, who had heretofore been in possession of said premises as tenant of said R. E. Daggs in pursuance of said conspiracy as aforesaid at or about the time of the recording of said deed to A. L. Johns, to-wit: on the 28th day of April, 1894, claimed and aserted to have abandoned said premises and property as the tenant of R. E. Daggs and on or about the first day of April, 1894, and thereupon to have become the tenant of said A. L. Johns, and to have thereupon taken possession thereof for said Johns and plaintiff shows that such abandonment and releasing of said property was done secretly and without any notice whatsoever to this plaintiff and with intent to deceive this plaintiff into the belief that said R. E. Daggs was still the owner of said premises and possessed thereof by said W. A. Daggs as his tenant and plaintiff on account of said secret transfer of possession if any was made was so deceived as above alleged, said defendant intended him to be, and the said action therefore proceeded to judgment without joining or making said Johns or W. A. Daggs defendants therein and plaintiff had no knowledge or information whatsoever when he commenced his said action and filed his notice of lis pendens as aforesaid, that any other person than R. E. Daggs had any interest in or claim whatsoever to said premises."

He then says on the 15th day of December, 1894, he went to where W. A. Daggs was living on the land and demanded of him that he give him, appellee, possession of the land, but he was refused, W. A. Daggs again telling him he was Johns' tenant, and has not yet got possession, but has been excluded to his damages in the sum of one thousand dollars. Now, on "information and belief," he alleges that said holding of said W. A. Daggs is in trust and for the benefit of said R. E. Daggs by and through the acts, procurement, aid, contrivance of said R. E. Daggs and said A. J. Daggs, who is as aforesaid the agent and attorney of said A. L. Johns." His prayer is—wherefore plaintiff prays judgment "against R. E. Daggs, A. J. Daggs, W. A. Daggs and A. L. Johns for the sum of 1000 dollars, his additional damages by reason of the premises stated as aforesaid, beside the costs of this action." He then asks a foreclosure of his mortgage and other things having no reference to the conspiracy, and the bill closes, "and that he may have such other and further relief as the circumstances of the case re-

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quire and equity and justice demand." This is the bill that set A. L. Johns' deed aside on the ground of fraud.

The statute of Arizona Territory having reference to fraudulent conveyances, Rev. Stat. of Arizona, Par. 2037, is as folows, to-wit:

"The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration."

The intent is the gist of the action, and that intent is one of fact and not of law, no conveyance can be set aside on the ground solely of no consideration.

Rev. Stat. of A. T., 2037.

"Fraud (says Marshall, C. J.) consists in the intention and that intention is a fact which ought to have been avered, for it is the gist of the plea and would have been trovers-able."

Moss vs. Riddle, 5 Crouch (U. S.) 351.

A fraudulent intent imports wrong and injury, hence injury must be shown. The words cheating and defrauding, or any other multiplicity of similar epithets do not import anything, and it becomes necessary for the Court to see that the intended means are in fact illegal, some dishonest purpose shown.

U. S. vs. Cruikshank, 92 U. S. 558.

The bill here alleges that R. E. Daggs and A. J. Daggs acting as his agent caused a deed to be made to A. L. Johns in which the whole of the mortgaged property was conveyed to A. L. Johns (not the whole, only part the city lots out) of Chicago, and his deed was withheld from the record until two days after his first suit and *lispendens* was filed and then it was put upon the record. Then he sues Johns on a contract in this deed of an assumption and then says "on information and belief that said Johns paid nothing whatever for said conveyance."

Then he says W. A. Daggs claimed and asserted that on or about the 28th day of April, 1894, about two days after he filed his suit, that he was not R. E. Daggs' tenant, but A. L. Johns' tenant. W. A. Daggs had thereby made a secret transfer of possession for the reason that W. A. Daggs did not take the trouble to hunt appelee and tell him about

it when appellee lived in Chicago, accordng to this bill, and Daggs in Arizona. The bill also alleges that he has a judgment against John S. Armstrong, but it nowhere says he could not get his claim (if he has any) off of him or that he is insolvent.

The fact that a deed is made is an every-day transaction and in and of itself is not a fraud. That it was not put on the record for 30 days is not a fraud:t hat it happened to reach the record two days after the appellee filed his bill is not a fraud either. Johns was in possession by W. A. Daggs. Was Daggs a party to his first suit? No. Yet appelee alleges he knew he was on the farm, but says he thought he was R. E. Daggs' tenant. Still he didn't make him party. Two days after suit appellee was told by Daggs, so he alleges, Daggs claimed, and asserted, he was Johns' tenant and not R. E. Daggs' tenant, and did he make them party? No. Whose fault is it that he did not make them party? It was appellee's. Appellee claims to be a mortgage, does it lay in his mouth to say that because I have a mortgage the wheels of trade must thereby stop or I will set your deeds aside? Appellee knew this sale had been made before and after he brought his suit. What right had a mortgagee to attack one who buys the mortgage property or a part of it? He has a mere lien in this territory. How could it effect him if there was a thousand sales made? He would and could not be even inconvenienced. If he is compelled to go to court to foreclose(that's not delay to him. He can't complain.

His bill for conspiracy is a sham excuse for not bringing in parties whom he aleges told him to his face all about their titles. At the time he filed his first suit he knew as much about the facts of this case as he did fifteen months after when he filed his second suit. He says he did not get possession when he asked his tenant for it to his damage in 1,000 dolars, but does not say he ever issued a writ of assistance. We have shown he could have brought in parties any time after suit commenced by motion. Then he says in his prayer he wants a 1,000 dollars additional damages against all by reason of the premises. Yet he set A. L. Johns' deed aside on the ground of fraud under this bill.

He alleged on information and belief that Johns paid nothing for his conveyance. Is this a sufficient allegation to set a deed aside for fraud? Although the deed was upon record when this suit was brought, nothing is said regarding its terms, except upon information and belief it was without consideration, and to sue Johns on a contract in the

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deed, thus electing to waive any wrong done by the deed. The truth is the mortgagor and mortgagee have colluded together and seek to pretend the claim not paid. This is the kind of a case where if the action of a mortgagee against a grantee of the mortgagor can obtain without suing the mortgagor that fraud can happen.

Now can appellee under these facts and law be heard to say he is stating a cause of action for conspiracy? None of these acts are in and of themselves fraudulent. They were not concealed from his view. He knew them fifteen months before he sued here; knew as well when he first sued as when he last sued. He was not delayed. How can a man have an intent to defraud and at the same time buy subject to a claim, and, moreover, agree to pay it, as appellee charges? Where is his intent to defraud? These charges are bogus charges built up for the purpose of attracting attention from the real purpose of the appellee. They have no substance. A mortgagee has no concern about such frauds, as this kind of frauds are committed every day by the million. If he gets more security, as he claims, why is it not a good thing to have it sold and resold? Appellee is in the ridiculous attitude of taking benefit from the transaction he pretends is a fraud. He affirms it by benefiting from it and then seeks to get more benefit from it by howling fraud against it, and setting Johns' deed aside.

We think we should not follow this point further. It is not propriety, and dismiss it, believing the demurrers of appellees should prevail.

It may be urged that because some of the appellants are relatives and that indicates fraud. That hallucination has long since been exploded by this Court. It will not cast suspicion.

Callieb vs. Thatcher, 151 U. S. 271.

Fraud alleged upon information and belief not sufficient.

Seidman vs. Geib, 16 Daly (N. Y.) 434.

Phillips vs. Schoaly, 271, N. J. E. 410.

The bill does not present sufficient grounds of equity jurisdiction. It is vicious.

Van Weil vs. Winston, 115 U. S. 228.

Injury must be shown. He says he has benefited by getting more security, and sues upon the contract. These positions are diametrically opposite. If he was benefited

by the contract he sued on he could not be injured by the deed.

Finn vs. Grau, 17 Fed. Rep. 407.

Where the federal court said: "The rule in equity is that it is not sufficient to charge fraud simply, but you must charge also some injury as the result of the fraud."

Appellee claims R. E. Daggs and A. L. Johns creditors, and claims the right to sue them upon contracts made for his benefit, while on the other hand sets their deeds aside and renders them unable to pay him or redeem from the sale. This will not do. It is mere sham and a subterfuge. No cause is stated for fraud and the Honorable Court will we believe, so declare.

At this juncture appellants call the Court's attention to the fact upon the face of this bill. That appellee elected his remedy and waived his right to say there is fraud or declare upon it. For that he first sued appellants on thes o-called contracts of assumption and thereby estopped himself to question the good faith of those who made them. Appellee cannot be heard to blow hot and cold at the same time. He cannot be heard to say these persons made these contracts for my benefit, and I elect to sue on them and take whatever benefit they afford and at the same time say these contracts were fraudulent, and set their deeds aside on that ground. This is a diametrically opposite and inconsistent position.

Yet this is the game played at here by the appellee. He sues on the contracts of assumption in the deed and takes a personal judgment against R. E. Daggs, A. L. Johns and sets Johns' deed aside at the same time.

In the Court below the learned Court instead of following the ruling of the Court of first instance, and allowing the appelee to recover on both his opposing positions, elected appellee's remedy for him and selected the suit setting the deed aside as against Johns', but struck down his cause and recovery on the first suit on the contract of assumption. They went further and declared that appeelee had searched the records before his first suit when appelee does not claim nor prove this for himself.

The court below had no power or authority to elect the remedy for a party. The party alone can do that. "Election goes not to the form, but to the essence of the remedy. It applies to the case where the law (not the practice) supplies to a party in vindication of a right two or more modes of procedure predicted upon conflicting theories. The function of the code is dormant until the party has made his

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election." Neither does the Court have anything to do with the case until the party has selected his remedy, and it is not in the province of the Court to elect the remedy for the plaintiff after the plaintiff has elected it for himself, not before.

"It may, therefore, be stated approximately, if not substantially true, that subject to the exceptions hereafter stated, the first pronounced act of election is final and imperative."

7 Am. and Eng. Ency. of Plead. and Prac. 364.

After suing on the alleged contracts of assumption as against R. E. Daggs and A. L. Johns, appellee is estopped and barred to assert by his own acts to say there is any fraud. His bill shows he knew all the facts at the time he brought it. That he sued on the contract of assumption and afterward in the same bill sues for fraud.

"No suitor is allowed to invoke the aid of the Courts upon contradictory principles of redress upon one and the same line of facts."

7 Am. and Eng. Ency. of P. and P. 363 and cases cited.

When he makes his first election his own act denies him the right to another cause of action. His election is conclusive and irrevocable. In Coulban vs. Thompson, 111 Mass 170-272, the Court said: "The defense of waiver by election is founded on an affirmance and the other upon the disaffirmance of a voidable contract sale of property. In such case, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all. The institution of a suit is such a decisive act; if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale or to receive one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."

The supreme Court of the United States laid down the rule on this point, and said: "The rule established by these cases is that any decisive act by a party, with full knowledge of all his right and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

Robb vs. Voss, 155 U. S. 13.

Appellee here knew all the facts as he shows by his bill, then sued upon the alleged assumption of the contract said

to be incorporated in the deed and thus affirmed the sale of the property and waived his right to say there was any wrong or fraud, and there was none. And then reverses in the same bill sues on a charge of conspiracy to defraud arising from the same deed a contract and seeks not only to get a personal judgment against the parties, but a judgment destroying the contract upon which he first sues.

This defect apearing on the face of the bill, appellant's contention is that it is reachable by general demurrer, and ask the Honorable Court to so hold.

ASSIGNMENT OF ERROR NO. 15.

THE COURT FURTHER ERRED IN AFFIRMING THE JUDGMENT BECAUSE THE COURT ERRED IN OVERRULING THE MOTION OF APPELANTS FOR A CHANGE OF VENUE ON THE GROUNDS THAT THE TRIAL JUDGE WAS SO BIASED AND PREJUDICED AGAINST THEM THAT THEY COULD NOT HAVE A FAIR AND IMPARTIAL TRIAL BEFORE HIM."

The motion for a change of venue in this action ssould have been sustained.

The affidavit fully complies with the statute.

It is leveled at the bias and prejudice of the judge who tried the case. The section of the Arizona law under which this application was made are Acts of 1891, Bill No. 41, page 59, is as follows:

"Sec. 1. Whenever either party to a civil action in any District Court of the Territory shall make and file an affidavit in the case, stating one or more of the following causes:

"Subdivision 3. That the affiant has cause to believe, and does believe that on account of the bias or prejudice or interest of said judge, he cannot obtain a fair nor impartial trial."

This language is the third clause under section 1 of the Act authorizing the motion for a change of venue.

Omitting title of the Court, the language of the affidavit for a change of venue is as follows:

"A. L. Johns, A. J. Daggs, R. E. Daggs and W. A. Daggs, defendants, being first duly sworn, says that they are defendants in the above entitled cause and that

they have cause to believe and do believe that Hon. A. C. Baker, judge of the above court, is biased and prejudicial against them so that they cannot have or obtain a fair or an impartial trial before him in this cause," and prayed the venue changed to some other district where such cause did not exist.

This statute came from Missouri, where it is so held.

In Re. Est. Whitman, 1st South Western, 125, Guinidick vs. Crum, 32 Pac. 800.

81 Mo. 93 ——— 57 Mo. 88.

89 Mo. 58 ——— 79 Mo. 198.

Apellants contend there is substance in this contention and that if the Honorable Court does not strike it down upon the grounds of demurrer it should be reversed upon this ground and a change of venue orderd.

"Section. 2. When a change of venue is directed for any of the causes mentioned in section 1 of this Act the Court or Judge shall send the cause to the most convenient county in the adjoining district, unless the parties in said action shall agree to some other county, in which event the cause shall be sent to the county so agreed upon by the parties, and the clerk of the court, in which the action is pending, shall forthwith transmit the papers and transcript of the proceedings in the case to the clerk of the court to which the venue is changed."

This affidavit complied with the statute. There is no better evidence of the bias and prejudice of the judge who tried this case than a reference to the judgment he rendered. It gave judgment against R. E. Daggs on the first judgment for $7,190.11, and on the second for $8,541.13 and foreclosed against him twice. It gave two judgments against Johns on his so-called assumption, and set his deed aside at the same time. It adjudged the whole job lot guilty of conspiracy, and the only leniency shown defendants was that he paroled them upon their own recognizance. When an affidavit complies with the statute it sweeps the jurisdiction of the judge away and he has no further jurisdiction than to grant the change of venue.

ASSIGNMENT OF ERROR NO. 16.

"THE COURT ERRED IN OVERRULING THE MOTION OF APPELLANTS FOR A CONTINUANCE, ON THE GROUNDS THAT A MATERIAL WITNESS, JOHN S. ARMSTRONG, THE MORTGAGOR, WAS

ABSENT, AND THAT HE WOULD TESTIFY THAT THE DEMAND SUED ON IN THIS CASE HAD BEEN FULLY PAID AND DISCHARGED."

It is reversible error to deny a continuance where the application complies with the requirements of the law and is not made for delay; and the evidence is material and diligence is shown.

The application was in due form (see R. R. 10) and made under Sec. 752 of the Revised Statutes of Arizona, which is as follows:

"On any application for continuance, if the ground for such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence and the cause of failure, if known, that this testimony canot be obtained from any other source; and if it be for the absence of a witness he shall state the name and the residence of the witness, and what he expects to prove by him; and he shall also state that the continuance is not sought for delay only, but that justice may be done."

This Statute was taken from the Statutes of Texas, wherein Burley vs. the State, 14 S. W., 1008, it is held that the Court has no discretion but to grant the application when the application is in due form.

Am. and Eng. Ency. P. and Prac., Vol. IV, p. 848.

Armstrong's cohort purchased at the sale and his testimony could not be had. We submit it was error to overrule motion for continuance.

ASSIGNMENT OF ERROR NO. 17.

"THE COURT FURTHER ERRED IN OVERRULING THE MOTION OF THE APPELLANTS FOR JUDGMENT AT THE CLOSE OF THE EVIDENCE OF THE APPELLEE, ON THE GROUND 'THAT THE EVIDENCE INTRODUCED BY THE PLAINTIFF IS NOT SUFFICIENT TO WARRANT THE RELIEF PRAYED FOR,' AND ON THE FURTHER GROUND 'THAT THERE IS NO EVIDENCE SUSTAINING THE ALLEGATION IN THE COMPLAINT,' AND THE JUDGMENT SHOULD HAVE BEEN IN FAVOR OF APPELLANTS AND AGAINST THE APPELLEE."

This motion being in the nature of a demurrer to the evidence entitles applicants to a review of the evidence, which will clearly show that the application for judgment was proper; the legal sufficiency of evidence is a question for the Court; the rule announced by this Court in the case of Chandler vs. Von Roeder, 24 How (U. S.) 227, is:

"When, assuming that all the testimony adduced by the one or the other party is true, it does not support his issue, it is the duty of the judge to declare this clearly and directly."

A demurrer admits only such facts as tend to prove, which is more than a scintilla and such inferences which overthrow either presumptions oy law, or inferences of fact are not indulged. No forced or arbitrary inferences are admitted.

Pawling vs. U. S., 4 Crouch (U. S.) 219.

The judgment roll in case No. 1854, James Wilson vs. John S. Armstrong and R. E. Daggs, marked Pltfs. Ex. A, was introduced in evidence, and it contained complaint founded on the two notes sued on herein; also ask foreclosure on the same property except the "city lots," and has one of the same parties, to-wit, R. E. Daggs. It also contained the summons and judgment and the order of sale, directed to the sheriff of Maricopa County of the property described in the complaint, and the sheriff's return, which return charges that in pursuance to the order of sale he advertised the property described in the complaint, by the notices provided by the Statutes by posting hand-bills and by publishing once a week for twenty-one days in the Arizona Gazette, a newspaper printed and published in the County of Maricopa, and further said: "That on Wednesday, the 6th day of June, 1894, the day on which the said real property was so advertised to be sold, as aforesaid, I attended at the time and place fixed for said sale, and offered said real property for sale at public auction to the highest bidder according to law; and sold the same to James Wilson for the sum of Seven Thousand Four Hundred and Forty-four Dollars ($7,444), he being the highest and best bidder, and said sum being the highest amount bid for the said property, and which amount I actually have received; and that I delivered to said purchaser a certificate of said sale and filed a duplicate thereof in the office of the County Recorder of the said Maricopa County, and I further certify that I deducted from the said sum of Seven Thousand Fonr Hundred and Forty-four dollars ($7,444) my fees, commissions and expenses, amounting to the sum of Two Hundred and Fifty-three Dollars and 90-100ths ($253.90), leaving a net balance of $7,190.10,

which net balance I paid over to the plaintiff's attorneys, whose receipt thereof is hereto attached; and I herewith return this writ partially satisfied in the sum of $7,190.10, there still remaining due and unpaid on said judgment interests and costs in the sum of $9.50.

Dated June the 6th, 1894.

(Signed) J. K. MURPHY,

By FRANK M. KING, Deputy Sheriff. Sheriff.

This instrument is headed "Office of the Sheriff of Maricopa County. I, J. K. uMrphy, do hereby certify," etc.

The sheriff's certificate is in this record, and attached to it will be found the following receipt, which is therein mentioned:

($7,190.10) Phoenix, A. T., June 6th, 1894.

Received from J. K. Murphy, sheriff of Maricopa County, Arizona, the sum of $7,190.10, amount of sale in the case of J. E. Wilson vs. John S. Armstrong, after deducting sheriff's fees, commissions and costs.

(Signed) THOS. ARMSTRONG, JR.,

Attorney for James Wilson, Plaintiff.

Filed June 22nd, 1894.

Says Mr. Black on judgment: "From the earliest times the written memorials of courts have been held to impart the most absolute and 'incontestable verity,' 'and are evidence of the highest nature.' "

Black on Judgments, Volume I, Par. 276.

The appelle thus with conclusive evidence proved that he had no demand against any one. That it was paid. The return also shows that the sheriff paid this money over to the counsel of appellee, who in turn gave his receipt for the same. Appelele then proved himself out of Court by the most solemn evidence, which under no circumstances can be disputed.

Again the plaintiff introduced in evidence a warranty deed, marked Pltfs. Ex. B, executed by John S. Armstrong to R. E. Daggs, for the purpose of showing that the notes and mortgage set out in the complaint had been assigned by R. E. Daggs. Assumption clause in same is as follows:

"The said Robert E. Daggs hereby assumes the payment of and agrees to pay two certain promissory notes, each for the sum of Two Thousand Three Hundred and

Fifty Dollars ($3,250), executed by John S. Armstrong on or about April, the 18th, 1893, to James Wilson and Desda A. Wilson, his wife; and secured by mortgage of the same date as said notes on the land hereby conveyed."

This above clause in deed is every scintilla of evidence that is in this record relied on by appellee to prove the liability of R. E. Daggs on the two notes, and mortgage set out in the complaint.

A comparative analysis of the above clause taken from the warranty deed from John S. Armstrong to R. E. Daggs does not tend to prove the allegation above set forth for the following reasons:

First: It contradicts the warranty deed. In this the deed shows the full consideration of the property paid cash in hand and the grantor covenants to warrant and defend the title to the property against all claims whatsoever.

Second: Two notes alone are assumed.

Third: The dates of the notes set out in the appellee bill is on April 24th, 1893, while those mentioned in the assumption clause is of date April 18th, 1893.

Fourth: The payee of the notes set out in the appellee pellee complaint is James Wilson, while the payees of the notes in the clause of assumption are James Wilson and Desda A. Wilson.

Fifth. No mortgage whatever is assumed; merely mentioned ———.

Sixth: The land on which the mortgage alleged to be assumed is suposed to rest is not the same land upon which the mortgage securing the notes sued on is alleged to rest, the difference being a large number of city lots in the town of Tempe worth $2,500.

Seventh: That while the mortgage sought to be followed covers a water right worth $3,500, it also covers two ditch rights, McKinney and Kirkland, worth $1,000, while the mortgage here mentioned covers only land.

Eighth: The notes sued on bear 8 per cent interest, while those assumed draw only 7 per cent after maturing.

Ninth: The dates of the mortgages are different.

The only points of similarity in the instruments set up by the assumption clause in the deed are:

First: The amounts of the notes are the same.

Second: The maker of the one set of notes has the same name as the maker of the other set, and as many people have the same name no presumption can be indulged; that where the same proper name appears in two different papers that they refer to one and the same person. The burden is on the plaintiff to make his case and he must show that the persons referred to are one and the same in the instruments mentioned, for it is a fact. There are hundreds of James Wilsons, John Smiths, William Jones and John S. Armstrongs. The country is full of them. Identity of name does not prove identity of person. Hence, the only actual similarity is the amount, one point of similarity and 8 of dissimilarity. Whether this could be called a scintilla jot or a title we are unable to say, but surely no lawyer will urge that it in any manner tends to prove the liability of R. E. Daggs on the notes and mortgage in suit.

The plaintiff in every case should do more than merely read his writ and take his judgment.

In this evidence there are eight points against the proof of assumption, and one (the amount) in its favor.

There was also a warranty deed introduced in evidence from R. E. Daggs to A. L. Johns, for the purpose of proving the assumption of the note and mortgage sued on. Assumption clause in same is as follows:

"The said A. L. Johns buys the herein described lands with full knowledge of the now existing James Wilson and Desda A. Wilson mortgage of Six Thousand Five Hundred Dollars ($6,500), and hereby assumes and agrees to pay the same."

This phrase just quoted is every scintilla of evidence that appears in this record offered, to prove that A. L. Johns assumed and agreed to pay the notes and mortgage set forth in the plaintiff's complaint.

A comparative analysis of the clause offered to prove the assumption of A. L. Johns of the notes and mortgage sued on will show:

First: That it disputes the consideration of the warranty deed and the warranting clause of the deed for that the deed warrants against all claims whatever "except the Wilson mortgage mentioned herein" which is the James Wilson and the Desda A. Wilson mortgage, not the Wilson mortgage in the complaint.

Second: There are no notes whatever assumed by A. L. Johns.

Third: It as clearly appears from this phrase that James Wilson and Desda A. Wilson are the mortgagors as it does that they are the mortgagees. It is ambiguous and uncertain of itself, whether they are mortgagees or mortgagors is a fact that cannot be assumed, but must be proved.

Fifth. A mortgage cannot draw interest in Arizona.

Sixth: The mortgagor in the complaint is John S. Armstrong and the mortgagee James Wilson only.

Seventh: The lands covered by each mortgage is different, the difference being the city lots worth $2,500.

Eighth: The mortgage here spoken of rests on land only, while the mortgage sued on rests also on $3,500 worth of water rights, the city lots worth $2,500 and two ditches, McKinney and Kirkland, worth $1,000 more.

Ninth: The mortgage in the complaint has attorney fees of 10 per cent, while the one in deed has none. The only similarity being:

First: The amount of the mortgage here referred same as mortgage in complaint.

Second: The name James Wilson appears in both, and as there are hundreds of James Wilsons, John Smiths and etc., the appelele should show where identity of name appeared by extrinsic proof, they were one and the same person.

Hence only one point, the amount, is certain.

This clause, therefore, does not tend to prove that Johns is even liable on any notes whatever, and certainly cannot be liable on any mortgage alone. The appellee could read his writ and then introduce a paper on which was written the amount set forth in his bill and with equal force and propriety claim a judgment, while R. E. Daggs, the grantor, does not assume any mortgage whatever. His grantee, A. L. Johns, does not assume any notes. As a whole it furnishes a mixture out of which nothing can be inferred in favor of the appelele. The mere fact that the amount happened to be the same proves nothing.

There was also introduced in evidence a deposition of A. L. Johns in another and different suit, and the only reference in that whole deposition, or squint at any proceedings in this case was, that A. L. Johns said, among other things, that he had purchased a tract of land near Tempe, known as the "Wilson tract," and that it was there shown that A. J. Daggs was the agent of R. E. Daggs in making sale of this Wilson tract of land.

There is nothing to show that the one hundred and eleven acres in suit here, or the city lots is the tract of land referred to by Johns in his deposition as "the Wilson tract."

There was also introduced parole testimony by the plaintiff of J. W. Evans, who testified that he went to the land mentioned and found W. A. Daggs in possession of the property as the tenant of A. L. Johns, and demanded the possession of Daggs, and Daggs refused to give him possession.

That he was the agent of James Wilson, and that James Wilson had not been in the territory since the year 1892.

The plaintiff then introduced R. E. Daggs as his witness, who testified that he was one of the defendants, and that he was president of the Bank of Tempe at the date of the first foreclosure suit in April, 1894; and that he did not know where the deed of R. E. Daggs to A. L. Johns was at that time, but that he supposed Johns had it; that he had not seen it since he executed it. That he did not know when the deed from R. E. Daggs to A. L. Johns was recorded; that there were a great many deeds come into the Bank of Tempe; and that as soon as they were there they were forwarded to the recorder for recording.

That he had received the full consideration of Eleven Thousand Five Hundred Dollars ($11,500) from A. L. Johns, and had executed to Johns his deed therefor; and described in detail the kinds of payment he had received.

That he had a lease with W. A. Daggs about the property (the one hundred and eleven acres, in suit), which lease had run out at the time he made the sale to A. L. Johns, or about the first of the April following the sale to Johns, 1894; and that he found W. A. Daggs in possession when he bought it; and that he remained in possession as long as he owned it; and when he sold it to A. L. Johns, W. A. Daggs arranged with A. L. Johns to remain as tenant of Johns upon the property; and that that was all he knew about it.

The appellee then produced the recorder, who brought with him the records, for the purpose of proving the warranty deed from R. E. Daggs to A. L. Johns, which contained the clause above referred to.

The appellee then closed his case, and the motion set out in this assignment of error was made and insisted upon by the appellants.

Urging that the rule first announced is correct, the judgment roll introduced by the appellee contains the sheriff's return, which contains in unmistakable terms that the

sheriff actually did receive the cash, and paid it over to the attorney for the appellee after deducting his fee, commissions and costs.

It only remains now to see what effect, in legal philosophy, a positive and unexplained and undenied sheriff's return has upon the appellee when introduced by him.

It has been laid down that the sheriff's return is conclusive between the parties to the suit of all matters returned, and is so far conclusive evidence that it cannot be contradicted, and was not attempted to be contradicted here, and is an indispensible monument to a title by the plaintiff.

U. S. vs. Slade, 2 Mason (U. S.) 76.

Black on Judgments, Vol. I, Par. 276 and cases there.

It will thus be seen that this sheriff's return is also a receipt; and imports absolute verity. Attached to this instrument also, as further proof that the debt was paid, is the receipt of Thos. Armstrong, Jr., the attorney for the appellee, who received the money.

The question arises, What effect a receipt has when thus introduced as evidence? against the appellee introducing it, it being unexplained and stands uncontradicted; and becomes prima facie evidence of the facts which it tends to prove; and goes to show conclusively that the plaintiff's (appellee's) attorney received the full payment of the debt; and by the introduction of the sheriff's return and the attorney's receipt simply proved himself out of Court.

Lyons vs. Williams, 15 Ill. Field 27.

Palmer vs. Priest, 1 Sprague (U. S.) 512.

Smith vs. Hoffman, 2 Cranch (C. C.) 651.

Lambert vs. Seely, 17 Howpr. (N. Y.) 432.

Spear vs. Ward, 20 Cal. 659.

And thus the record stands uncontradicted and unexplained that the claim is proved by the appellee is paid and the motion for judgment shall have prevailed.

The next question upon the evidence is, whether or not the assumption clause in the deed tends to prove that R. E. Daggs assumed and agreed to pay the notes and mortgages sued on to John S. Armstrong.

This Court has laid down the rule on this point by Mr. Justice Woods, for the Court said: "There must be words

in the deed of conveyance from which by fair import an agreement to pay the debt can be inferred."

Shepherd vs. May, 115 U. S. 505.

The notes sued on are duplicates, except one is due one year later than the other.

The notes sued on have a credit of date October 24th, 1893; but it is not shown who made the payment.

It is seen by the comparative analysis above that it cannot be understood from the clause of assumption in the deed, nor can it be warped by any kind of an inference to mean that the clause in the deed referred to tends to prove in any manner that R. E. Daggs even assumed the notes sued on, much less the mortgage.

The clause sought to prove an assumption of the mortgage sued on is as follows: "And second by mortgage of the same date as said notes on the land hereby conveyed." This merely to further describe the two notes. This reference describing the notes does not assume the mortgage. A mortgage is merely mentioned as existing on the property securing the notes.

The rule governing assumptions was succinctly stated by this Court in Elliott vs. Sacket, 108 U. S. 132 Reading, p. 140, where this Court says:

"An agreement merely to take land subject to a specified incumbrance is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment of the mortgage, does not bind himself personally to pay the debt."

And further said: "That the language of the agreement in the present case does not amount to such an undertaking on the part of Elliott. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee."

The clause above does not go so far as to say that he buys subject to the mortgage even. Neither does he say he assumes it.

First: Upon the face of the clause in the deed, as compared with the notes set forth in appellee's complaint are not alike, as shown by the comparative analysis above herein, and do not refer to each other. They are clearly a reference to two separate instruments.

Second: The evidence shows that the debt sued on has been paid.

Third: The deed says upon its face that "cash was in hand paid."

Fourth: That Eleven Thousand Dollars was thus paid for a far less amount of land than is contained in the mortgage, to-wit, the city lots.

Fifth: That the deed contained express covenants of warranty against all incumbrances and claims against the land, leaves the mortgagor in the position where he could not enforce the so-called contract of assumption against his grantee. How could the mortgagee take a greater right? It thus stands a mere nudum pactum. A contract which no one can enforce. How can subrogation happen? There is no asset of the mortgagor either immediate or remote that he could reach against his grantee. How, then, by "fair import" "can it be inferred" that an agreement was made to pay this debt? It is simply not there.

Sixth: That R. E. [illegible]s did not agree to pay any mortgage. This mortgage has additional obligations from the notes such as 10 per cent attorney fees, payment of taxes, insurance, and etc.

Seventh: That the notes are not the same notes.

Eighth: That there is no identity in the statements, and also by the comparative analysis herein above it is shown that eight reasons show that the notes and mortgage in suit were not assumed while there was identity in one, the amount, and hence a failure of proof, no proof.

Where the identity of the instrument is left in doubt, by the terms of the deed parole evidence must be introduced to make it clear that the instruments are one and the same; otherwise, thre is a failure of proof. There is no proof here.

The reason of the rule is, that it is the duty of the party upon whom rests the burden to prove every fact necessary to recover. And the Court will not infer it for him. If the instruments are one and the same appellee should have shown it by extrinsive proof.

"The identity of the mortgage assumed when left in doubt by the terms of the deed may be shown by parol evidence. Thus where a deed, in describing a mortgage assumed by the grantee gives its date and amount, but recites that it was executed by the grantor whereas it was executed by the grantor's grantor and there is no other mortgage of

like amount and date parol evidence is apply the covenent to the mortgage and reformation is not necessary."

Jones on Mortgages 740 A. and Cases.

Whereas a case like that at bar the only similarity being the amount with 8 other reasons and dissimilarities against it, with one covering property worth 7000 dollars more than the other of different dates and parties payee, surely the instrument proves nothing unless reformed to show that it meant the plaintiff's notes and mortgages and it is not admissable, even if parol testimony was offered to show the instruments referred to were one and the same without reformation, yet in this case while the appellee offered the tstimony of R. E. Daggs, one of the grantees, in his favor he did not ask him one solitary question about these instruments and there is not a jot or tittle of oral testimony in this record on this question.

N. Y. Life Ins. Co. vs. Atkin, 125 N. Y. 660.

26 N. E. 732.

Jackson vs. Sill, 11 Johns, 201.

Loomis vs. Jackson, 19 Johns 449.

Dobbs vs. Patter, 18 Barb. 193, 201.

Burr vs. Ins. Co. 16 N. Y. 267.

If it is argued by the opposition in defiance of the record that the person who purchased at the sale, James Wilson, is the same person as James Wilson, appelee, this position cannot be maintained. There are two reasons why the identity of name does not establish the identity of person:

The first is: It woud impeach a solemn record, i. e., the sheriff's return and satisfaction and judgment.

Bryan vs. Kales, 31 Pac. (Ariz.) 517.

The second reason is: That the sheriff's return, as well as the receipt by the plaintiff's attorney, casts a doubt upon the transaction, for it would hardly be reasonable to suppose that James Wilson, the plaintiff, would pay cash for property sold at the sale under a mortgage held by himself.

The sheriff had the money, deducted his fees and paid the net amount over to plaintiff's attorney. The attorney's receipt shows that he received and receipted for the net amount of the sale as paid him by the sheriff.

This casts a doubt upon the identity of the person at the transaction. Where this is true parole evidence is necessary to show that they were not one and the same person.

Abbott's Trial Evidence, p. 101, Par. 49, Note 6.

Jackson vs. Christian, 4 Wend. 277.

Abbott's Trial Evidence, p. 398.

Another reason is: That the name, James Wilson, is such a common name that it is unreasonable to allow the presumption of identity.

1st Whart. Ev. 665, Sec. 701.

If the appellee would have desired to reform the deed from R. E. Daggs to A. L. Johns so that it would show that his claim was actually assumed he should have brought his action for that purpose. Not having done so, and not having asked that the instrument be reformed; and not showing in any wise by parole testimony that it was the intention of the parties to the deed of John S. Armstrong and R. E. Daggs to asume the notes and mortgage, our contention most seriously is that he simply made a failure of proof, and that the court should have so held upon the motion or demurrer to the evidence.

The rule in such cases as laid down in this court is as follows:

"The judges are no longer required to submit a case to the jury, merely because some evidence has been introduced by the party having the burden of proof unless evidence be of such a character that it would warrant the jury to proceed in favor of the party introducing such evidence. Decided cases may be found, where it is held, that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury but the modern decisions have established a more reasonable rule, to-wit: that before the evidence is left to the jury, there is, or may be in every case a preliminary question for the judge, not whether there is literally no evidence but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Commissioners vs. Clark, 94 U. S. 278-284.

In the contract of assumption by A. L. Johns the deed recites that he asumes a mortgage. The assumption of a mortgage by a grantee, where his grantor has not assumed to pay it and is nit liable on that mortgage, he is not liable.

King vs. Whiteley, 10 Paige (N. Y.) 465.

Biddell vs. Brizolara, 64 Cal. 354.

Morris vs. Nif, 4 Kan. 654.

New England Trust Co. vs. Nash, 46 Rep. 987.

Brown vs. Stillman, 43 Minn. 126.

Crowell vs. Courier, 27 N. J. Eq. 152.

Where it is said that such a contract is a mere undum pactum.

Dunning vs. Leavitt, 85 N. Y. 30.

We contend also that the same reasons and law that obtain to exempt R. E. Daggs from liability here also applies with equal force to his grantee, A. L. Johns, and by our comparative analysis we have shown that upon no hypothesis, except that the amount refered to is the same, can it be infered from the evidence introduced, or infered that A. L. Johns is liable upon the notes or mortgage sued on. That the amount is the same amounts to nothing, not even a scintilla, jot or tittle, and hence there is absolutely nothing tending to prove that A. L. Johns is liable.

We also urge the further proposition, in connection with this argument, for consideration: That we have heretofore urged by demurrer, that neither of these grantees are liable, even if it was admitted that they had assumed and agreed to pay these debts, which would be a most violent and irrational admission here, upon the principle that a grantee who assumes a mortgage and agrees to pay it does not become a principal debtor, and never becomes liable until his mortgagor is exhausted, which has never been shown to have been done in this case; and then only the mortgagee is entitled to be subrogated to the right of the mortgagor, and that right is the right a creditor has in equity to reach property belonging to his debtor when the debtor has been exhausted. The mortgagor could not enforce the contract of assumption against his grantee in face of the covenants of warranty in his deed, then how could the mortgagee be subrogated to a right the mortgagor did not have and could not enforce?

Keller vs. Ashford, 133 U. S. 610.

Shephard vs. Pepper, 133 U. S. 652.

Now, there being no parole testimony whatever offered to prove the so-called contract of assumption alleged in the complaint, but not set out, the contention on this point rests solely on the two clauses found in the two warranty deeds and herein set out in full, and the rights of the appellee to recover upon the breaches of so-called contracts of assumption of his claim and his right to foreclose of the lien of his alleged mortgage to satisfy the same. It must be wrung out of these two clauses we have shown that upon no theory that can be grappled from the books can it be

shown that the appellants are liable under the evidence and therefore the motion for judgment should have been sustained.

Reverting again to the opinion it will be seen that the court below held this assignment of error immaterial. In fact the opinion contains this language:

"Presuming that the decree declaring the deed void is correct and that the evidence fully sustains it," etc., which indicates that the trial branch of this case was never looked at; simply presumed the evidence sustained the decree and threw it over as "unworthy of their consideration."

Appellants ask the Honorable Court to sustain this motion for judgment.

ASSIGNMENT OF ERROR NO. 18.

THE COURT ERRED IN SUSTAINING THE JUDGMENT BELOW, "THAT BECAUSE THE SAID JUDGMENT IS VOID," AND SHOULD HAVE BEEN HELD FOR NAUGHT.

An examination of this judgment will disclose a mass of inconsistency, ambiguity and viciousness that is not understandable. Its analysis shows:

The analysis of the judgment in this case will show without doubt that it is absolutely and irreconcilably void.

I

It sets the sale—certificate of sale—deed and satisfaction of the first judgment aside and reinstates the first judgment of $7,190, out in full force and ordered the clerk to cancel the satisfaction of the judgment on the record. This is the judgment appellee alleges in his bill is against John S. Armstrong and R. E. Daggs and is the lien covering all of John S. Armstrong's property of over 30,000 dollars. The mortgage lien was also foreclosed against this claim.

II.

It also gives personal judgment against R. E. Daggs and A. L. L. Johns upon the assumption clause for $8,541.13 and that $6,500 of this sum bear 8 per cent while the balance draws 7 per cent to be recovered as well, and which last amount includes an attorney fee of $350.00.

III.

It is then decreed that the sum of $8,541.13 is a lien upon the property described in the bill, and although the

city lots are described in the bill, the mortgagor, their owner, is not before the court. Yet the judgment declares "which mortgage and lien is hereby foreclosed, and decreed to be wholly unpaid and unsatisfied."

IV.

It is then adjudged and decreed that all the appellants are guilty of conspiracy to cheat and defraud appellee out of the fee and possession of the land described, and upon such charge of conspiracy it is adjudged and decreed that the deed from R. E. Daggs to A. L. Johns is fraudulent and void as to this (plaintiff) appellee.

V.

It is now decreed that the first judgment, $7,190.10, "do stand," and that it be carried into effect by execution and order of sale against the property therein described, and that his lis pendens in his first suit was full and complete notice to A. L. Johns of his first suit and of the conveyance which had been first set aside.

And also decreed that the deed from R. E. Daggs to A. L. Johns was given and recorded solely to cheat and defraud the creditors of R. E. Daggs and especially appellee and to cast a cloud on the title to any purchase at sheriff's sale of the mortgaged premises.

VI.

It is then ordered, adjudged and decreed that orders of sale issue to sheriff and that he seize and sell the property covered by the mortgage to satisfy his first judgment of $7,160.10 (which judgment includes $350.00 attorney fees and $24.80 costs) "with costs and accruing costs," and if the property fails to sell for enough to pay the judgment the costs and accruing costs, then the sheriff make the balance due upon this judgment, the judgment for $8,541.13, out of any other property of R. E. Daggs and A. L. Johns, (A. L. Johns was not a party to the first suit it must be remembered) and if the property fails to sell for enough to pay the first judgment of $7,141.13 the balance due must be made out of J. S. Armstrong, R. E. Daggs and A. L. Johns. So it is seen that when the mortgaged property is sold if it fails to satisfy judgment No. 1954 of $7,161.13, with costs and accruing costs, the balance must be made out of J. S. Armstrong, R. E. Daggs and A. L. Johns, and this judgment No. 2327 of $8,541.13 must be made out of R. E. Daggs and A. L. Johns. So we have one personal judgment against John S. Armstrong of $7,161.10, at 7 and 8 per cent interest, two personal judgments against R. E. Daggs, one for $7,160.10 at 7 and 8 per cent interest, and the other for $8,541.13 at

7 and 8 per cent interest, and two personal judgments against A. L. Johns, one for $7,160.10 at 7 and 8 per cent interest, the other for $8,541.13 at 7 and 8 per cent interest. Although Johns was not a party to the first suit, with a judgment finding all the appellants guilty of conspiracy and setting the deed from R. E. Daggs to A. L. Johns aside for good measure.

VII.

It is then adjudged that all parties defendants, appellants here, have notice of his lis pendens filed April 26th, 1894, and that their rights are decreed severed, and that at end of six months sheriff execute deed to property to purchaser. The property described to be sold here is the 5 city lots, the 111 acres of land, the water right and the ditch rights.

VIII.

It was also decreed that appellee have the right to apply force for a receiver upon the pleadings and judgment; he should have a good smart one, too, to carry this judgment into effect. It is here seen that the first foreclosure covered only the 111 acres and water right against the mortgagor and R. E. Daggs while the last covers the city lots belonging to the mortgagor, who is not a party to this suit, while the decree adjudging A. L. Johns bound to pay his first judgment, and he was not a party thereto. What shall be done with this blunderbus decree and piecemeal foreclosure? We contend it is upon its face without argument or authority; absolutely void.

Now, reverting to the opinion. It was attempted to modify this wonderful decree by a mere suggestion and reference to folios, and as the folios referred to are 264-5 and 261, in this record, are in the bill of exceptions and not the judgment. The folios in the judgment being 101 to 108, neither this court or counsel can know what was meant. It can, however, be grappled from his honor's language that he intended to relieve Johns from one of the judgments against him, but as there were two judgments given against Johns it cannot be understood which one was meant. Unless it can be said from the language and the reference to Johns in the direction to the sheriff, "That said sheriff make the balance due upon said judgment out of any other property of said defendant R. E. Daggs and A. L. Johns as an ordinary execution," as shown in folio 270. Refering to the analysis of the judgment it is seen that if it is said it is meant to exempt Johns from one of these judgments the other still stands. If it was intended to have exempted

Johns from both personal judgments the jurist below would have so said in plain language. There being no judgment at the places refered to it is left in doubt what was done. We then have it that as best counsel can understand there is yet one prsonal judgment against A. L. Johns with his deed set aside to the property and he was not a party to the first. Two personal judgments against R. E. Daggs for $15,701.23 and two foreclosures of same mortgage while John S. Armstrong, the mortgagor, has the first judgment of $7,190.10 with a foreclosure against him re-decreed in this suit while he was not a party to the last suit. We therefore submit this judgment is absolutely void.

The assignments of error upon the bill of exceptions are as follows: (See R. P. 143 for bill of exceptions.)

ASSIGNMENT OF ERROR NO. 19.

"THE COURT FURTHER ERRED IN AFFIRMING THE JUDGMENT, AND AFFIRMING THE RULINGS ON THE ADMISSION OF EVIDENCE, AND IN ADMITTING EVIDENCE," AS FOLLOWS:

"The Court further erred in affirming the judgment, and affirming the rulings on the admission of evidence, and in admitting evidence," as follows:

Of one J. W. Evans, who was permitted to testify that he had went to the property in question and asked of the tenant (whom he found in possession) possession of the property, and to give a conversation between himself and W. A. Daggs (to the effect that Daggs was the tenant of A. L. Johns, and had been such tenant since Johns had purchased) and about the property upon which the said W. A. Daggs, the tenant, lived, and to testify about a sheriff's deed in case of Wilson vs. Armstrong and R. E. Daggs; and to testify that W. A. Daggs, the tenant, had refused to give up possession. Over the objection of the appellants, that the same was incompetent, irrelevant and immaterial; and for the further reason that it was not yet shown that any such a case existed.

The appellant also asked the Court to strike out this evidence as against A. L. Johns, because the defendant Johns was not present.

All of which objections were overruled, and exceptions taken at the time.

The appellants contend that this evidence introduced was clearly without right, and should have been stricken out of the Court, because there is no issue in the pleadings to

which any of this evidence could possibly have any reference. ioffIh" 7u,OY rev-k sthe e,anda IIo,re Wffi 6rdg 34 lffi mh

It could not be competent as to A. L. Johns, because he could not be bound in any manner by conversation between his tenant and J. W. Evans, a stranger, when he was not present; and hence appellants contend that the Court erred in allowing such evidence to be introduced over their objections.

ASSIGNMENT OF ERROR NO. 20.

"THE COURT ERRED IN ADMITTING THE EVIDENCE CONTAINED IN THE DEPOSITION OF A. L. JOHNS, TAKEN IN ANOTHER SUIT," THE SUBSTANCE OF WHICH IS:

That said Johns lived in Chicago, Illinois. That he is a live stock commission merchant, and real estate in the Union Stock Yards. That he was subject to rheumatism about the damp climate of Chicago. That he desired to purchase some land which was in a warm country. That he had advertised for property in the Chicago Drovers' Journal. That he had had some correspondence with R. E. Daggs. That A. J. Daggs had come to his office in Chicago, Illinois, and had entered into some contracts with him for the sale of some land. Among other tracts sold to him, after abstract of title had been furnished him and passed on by his attorney, was the "Wilson tract" near the town of Tempe.

Johns also testified that he was not related to R. E. Daggs or A. J. Daggs. This is the only mention made by Johns of the property, or any intimation of the property of this suit.

This evidence was produced in the form of a deposition, which deposition had been taken in another suit.

The appellants objected to this deposition, for the reason that under the statute they had had no notice that the same would be produced in evidence.

And on the further ground that the said deposition was incompetent, irrelevant and immaterial.

What relevancy this deposition could have to any issue in this case appellants admit they are unable to see, as it does not even identify the land in suit.

It is not a deposition taken in this case at all.

It does not relate to the consideration of the deed of Johns or R. E. Daggs.

It shows that Johns was not related, in any manner at all to said R. E. Daggs or any one of the other appellants.

If it is said that it was introduced for the purpose of showing fraud we contend that it is no fraud for a commission merchant in Chicago to buy and pay for property in Arizona Territory.

And we further say that we are unable to find any legal reason for its competency, its relevancy or its materiality.

ASSIGNMENT OF ERROR NO. 21.

"THE COURT FURTHER ERRED IN ADMITTING IN EVIDENCE THE TESTIMONY OF R. E. DAGGS IN REGARD TO QUESTIONS RELATING TO THE LONDON COMPANY."

Wherein the plaintiff was permitted to cross-examine his own witness as to when the company was organized. As to where it was organized, over the objections that the questions had no relevancy to the issues in this case, and over the objections and exceptions that it was incompetent, irrelevant and immaterial.

This was the (plaintiff's) appellee's own witness and he was bound by his statements whatever they may be.

The plaintiff was also permitted to ask what other property had the London Company at the time it transfered its stock for the purchase of the land in question to A. L. Johns.

The defendants objected to any testimony relative to the London Company, for the reason that it was not a party to this action, and that such testimony was incompetent, irrelevant and immaterial.

All the objections were overruled by the Court and defendants excepted.

The witness was then compelled to testify all about the property of the London Company; and how many acres of land it had owned; and how many cattle and other stock it owned; and whether or not its property was free from incumbrance; and what the consideration of the deed from A. L. Johns to the London Company was; and who recorded the deed.

Thereupon the defendants objected again that the testimony had no reference to the issues of the case.

Objection was overruled and the defendants excepted.

The counsel for the plaintiff then cross-examined his own witness about the minutia of the consideration of the transfer of the property of A. L. Johns to the London Company, and about the dealings between the London Company and A. L. Johns.

The appellants contend that under no theory of the pleadings in this case was this evidence competent, relevant or material. That The London Company, not being a party to this action it could not matter in this suit how much it owned, what the character of the property was, or what the dealings of A. L. Johns was in regard to the business between him and the president of the London Company. That it cannot be a crime, tort nor any other character of fraud or negligence for A. L. Johns to sell any piece of property that he may have, and for these reasons the testimony is entirely improper, and this record should not have been burdened with this testimony. If it is urged to show fraud then we say there is not one of the acts set forth in the bill or proved by the evidence that is any other than plain everyday, everybody dealings, and if it be fraud then human conduct is but a mass of fraud.

ASSIGNMENT OF ERROR NO. 22.

"THE COURT ERRED IN ADMITTING IN EVIDENCE THE WARRANTY DEED FROM JOHN S. ARMSTRONG TO R. E. DAGGS, OVER THE OBJECTIONS AND EXCEPTIONS OF THE APPELLANTS, FOR THE PURPOSE, AS IT WAS STATED, TO PROVE THE ASSUMPTION OF THE NOTES SET OUT IN THE COMPLAINT."

The notes set out in the complaint are described, to-wit:

Phoenix, Ariz., April 24th, 1893.

(Which two notes are in duplicate except that one is due one year later than the other.) For value received, on or before the 24th day of April, 1894, I promise to pay to the order of James Wilson, at the office of J. W. Evans, Phoenix, Arizona, Three Thousand Two Hundred and Fifty Dollars, at 8 per cent interest, payable semi-annually, and signed,

John S. Armstrong.

The assumption clause in the deed introduced for the purpose, as it was said, to prove that R. E. Daggs had as-

sumed and agreed to pay the above described note was as follows: "The said Robert E. Daggs hereby assumes the payment of, and agrees to pay, two certain promissory notes, each for the sum of Three Thousand Two Hundred and Fifty Dollars, executed by John S. Armstrong on or about April 18th, 1893, to James Wilson and Desda A. Wilson, his wife, and secured by mortgage of the same date as said notes on the land hereby conveyed."

The appellants objected to the introduction of this deed on the ground that it did not refer to any issue in this suit, and is incompetent, irrelevant and immaterial.

Objection overruled, and defendants excepted at the time.

We have cited authorities heretofore upon the proposition of assumption which are applicable under this assignment of error. It is but necessary, under this assignment of error, to compare the clause in the warranty deed which was introduced to prove that R. E. Daggs had assumed and agreed to pay the two notes sued on, and the mortgage.

The notes that are called for by the clause of assumption were executed by John S. Armstrong to James Wilson and Desda A. Wilson.

Dated April the 18th, 1894.

There is but mere mention in the assumption clause that these two notes are secured by mortgage of the same date.

The only reference between the two instruments is, one was executed by John S. Armstrong, as was also the other, who is not shown to be the same person; and the amount appears to be the same in the two. The analysis heretofore shows there are nine points of difference and one alike in the instruments referred to, the amount being the same in each.

The Court is bound to presume that these two sets of instruments exist unless there is something in the proof to show the contrary, and there is nothing.

This instrument is not reformed by any procedure, nor was the set of facts, set forth in the notes as sued on by plaintiff shown by parole testimony, even if parole testimony would have been competent to be the same notes; hence, they being entirely dissimilar the assumption clause in the warranty deed fell under the objection made by the appellants to its introduction.

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Abbott's Trial Evidence, p. 720.

That the deed from John S. Armstrong to R. E. Daggs as well as the one from R. E. Daggs to A. L. Johns were warranty deeds.

The laws of Arizona governing the construction of deeds is as follows:

Par. 223,, Sec. 10. "From the use of the word 'grant' or 'convey' in any conveyance by which an estate of inheritance of fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied unless restrained by the express terms contained in such conveyance.

"1. That previous to the time of execution of such conveyance the grantor has not conveyed the same estate or any right, title or interest therein, to any person other than the grantor.

"2. That such estate is at the time of the execution of such conveyance free from incumbrance.

"3. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

"Par. 224, Sec. 11. The term 'incumbrances' includes taxes, assessments and all liens upon real property."

A mortgage in Arizona is but a mere lien made so by statute.

Revised Statutes of Arizona Territory, Par. 3155, Sec. 24, is as follows:

"A mortgage of the real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

Such a mortgage passes no estate in the land.

It is observed by the plain terms of these statutes and by the clause in the deed, which is "That the said party of the first part, for and in consideration of the sum of Eleven Thousand dollars to him in hand paid by the said party of the second part does by these presents, now 'grant, bargain, sell and convey' unto the said party of the second part and to his heirs and assigns forever, etc." Then follows a description of the property, which is far less than the property described in the mortgage, John S. Armstrong reserving a large portion of the property to himself.

It is hardly fair to infer that John S. Armstrong would be able to sell this property for a full cash consideration and reserve a large portion to himself, and at the same time have the parties who bought assume at the same time a large indebtedness, when the value of the whole property would not exceed the sum of the price paid by this grantee.

It is more proper to reason that he got enough out of the sale to pay the full indebtedness and what he had paid out in cash, and made his cash profit as well as the property he reserved; and as his deed shows bound himself to pay the claim of appellee which he could well afford to do, and as this is what the contracts of the parties show we insist this is the proper deduction.

ASSIGNMENT OF ERROR NO. 23.

"THE COURT ERRED IN ADMITTING THE WARRANTY DEED OF R. E. DAGGS TO A. L. JOHNS IN EVIDENCE OVER THE OBJECTION OF APPELLANTS; THAT IT DID NOT REFER TO ANY ISSUE IN THE CASE AND IT WAS INCOMPETENT, IRRELEVANT AND IMMATERIAL."

This deed was put in by appellee to show that said Johns had agreed to pay the claim of appellee. The clause said to prove this is as follows:

"The said A. L. Johns buys the herein described lands with full knowledge of the now existing James Wilson and Desda Wilson mortgage of six thousand five hundred dollars and hereby assumes and agrees to pay the same."

And in the covenant of warranty this clause appears: "Except the Wilson mortgage herein." This clause is every dust of evidence offered to prove that A. L. Johns assumed the notes and mortgage of appellee. From this clause it cannot be infered by any process of guessing, much less reasoning or influence, that the notes and mortgage sued on are meant or intended to be assumed. This is a mortgage called the James Wilson and Desda A. Wilson mortgage. These names are merely used to designate or describe a mortgage and it cannot be understood whether these parties are the mortgagees or the mortgagors. No payees or payors mentioned. It does not mention any notes whatever. A mortgage is the mere evidence of a lien in Arizona, as we have heretofore shown. The notes are the evidence of the debt. The assumption of a note might carry the mortgage but the assumption of a mortgage never carries the debt. We therefore contend that this evidence was wholly improper and it was error to admit the same.

ASSIGNMENT OF ERROR NO. 24.

"THE COURT ERRED IN MAKING AND PROMULGATING THE SO-CALLED STATEMENT OF FACTS IN THIS CASE BECAUSE SAID STATEMENT OF FACTS WILL NOT SUSTAIN THE JUDGMENT IN THIS CAUSE NOR ANY PART THEREOF."

A statement of facts must not be a mere statement or recital of the evidence, "but the facts as found from the evidence."

Ins. Co. vs. Tweed, 7 Wall, reading page 51.

It canont be "a mere report of the evidence but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the (facts) propositions of facts which the evidence establishes and not the evidence on which these ultimate facts are supposed to rest."

Norris vs. Jackson, 9 Wall 127.

Lenison vs. Geuard, 21 Wall 302.

In Lemon vs. Dick, 148 U. S. 7, Mr. Justice Gray said: "No mere recital of the testimony, whether in the opinion or in a bill of exceptions, can be deemed a special finding of facts within its scope."

Saltstall vs. Poutwell, 150, U. S. 417.

Nor can the opinion of the court "assigning reasons for its conclusions" be treated as a finding of fact to enable the court to determine whether the statement of facts sustain the judgment.

British Queen iMning Co. vs. Baker Silver Mining Co., 139 U. S. 222 and cases there cited.

No bill of exceptions is necessary to bring the question on statement of facts whether it sustains judgment.

Berger vs. Schllinger, 152 U. S. 581-6.

In Glendersleeve vs. New Mex. Mining Co., 163 U. S. 109, reading page 118, this court said: "It has been frequently held that the authority of this court on appeals is limited to determining whether the court's findings of fact support its judgment or decree and whether there is any error in rulings duly excepted to in the admission and rejection of evidence."

Hanison vs. Perea, 168 U. S. 311.

This rule does not preclude this court from an examination to see whether there is any evidence at all to sustain the findings. If so, then this court has no means of protecting a litigant or preventing a fraud upon itself from a concocted statement of facts, however bogus or false.

In determining the scope of the inquiry upon which a review of the statement of facts is treated, it has been said by Mr. Justice Gray: "The question whether the facts found by the court in the case at bar are sufficient to support the judgment below includes the several questions of law effecting the merits of the case."

Allen vs. St. Louis Bank, 120 U. S. 30.

The amount in dispute being over $5,000, to-wit: $6.500 and interest, determines the jurisdiction.

The statement of facts made and suit here by the court below is as follows:

STATEMENT OF FACTS.

The Court finds the facts in the above entitled case to be as follows:

I.

That on the 24th day of April, 1893, John S. Armstrong executed a mortgage on certain real estate described in the complaint herein to James Wilson, to secure the payment of two certain promisory notes in said complaint set forth, each being for the sum of $3,250.00 and interest, and dated on said 24th day of April, 1893.

II.

That afterwards and on the 18th day of December, 1893, said Armstrong sold said premises thus mortgaged to defendant R. E. Daggs (appellant here), and conveyed the same by certain deed of conveyance, in which said defendant R. E. Daggs agreed and bound himself, his heirs, executors and assigns, to pay or cause to be paid to the said Wilson the aforesaid notes and mortgage, under which sale and transfer the said R. E. Daggs entered into the possession of the said premises by one W. A. Daggs as his tenant.

III.

That on the 26th day of April, 1894, default having been made in the payment of the said notes, secured by said mortgage, the said Wilson commenced an action in the District Court of Maricopa County against the said Armstrong and R. E. Daggs for the recovery of the amount due upon said notes and for the foreclosure of the mortgage upon the premises aforesaid, and on the same date filed a lis pendens in the office of the Recorder of said County.

IV.

That at the time of the beginning of said suit, the defendant W. A. Daggs was in the possession of the said premises; and the title to said premises, so far as disclosed by the record, then appeared to be in said R. E. Daggs.

V.

That after personal service upon the defendants R. E. Daggs and J. S. Armstrong, and default made and entered therein, said action proceeded to judgment in the said District Court on the 8th day of May, 1894, against the said defendants J. S. Armstrong and R. E. Daggs for the full amount due with costs and for the foreclosure of the mortgage.

VI.

That thereafter and on the 6th day of June, 1894, the said premises were sold by the Sheriff of Maricopa County under execution and order of sale issued upon the said judgment, and were bid in by the plaintiff for the full amount of his judgment.

That thereafter and on the 12th day of December, 1894, the said Sheriff, there having been no redemption, executed a deed conveying or purporting to convey the premises aforesaid to the plaintiff by virtue of said foreclosure sale; and thereafter, upon a demand for possession of the premises by the said purchaser under said sheriff's deed, the aforesaid W. A. Daggs then being found in possession, refused to surrender the same and claimed to hold possession thereof as the tenant of one A. L. Johns, and has from that time to the present continued to hold and occupy said premises and property as such tenant of A. L. Johns to the total exclusion of plaintiff James Wilson.

VII.

That on the 28th day of April, 1894, after the service of summons upon said R. E. Daggs in said action, and the

filing of the lis pendens aforesaid, a deed was placed on record in the office of the County Recorder of said County, which said deed purported to convey the property in question from said R. E. Daggs to said A. L. Johns of Chicago, Illinois.

That at the time the demand for possession as aforesaid was made by said Wilson upon the defendant W. A. Daggs, said W. A. Daggs claimed and asserted that on the first day of April, 1894, he ceased to be the tenant of said A. L. Johns, and took possession of said property for said Johns at said time and from that time forward held possession of said premises as the tenant of said A. L. Johns and not as the tenant of said R. E. Daggs.

VIII.

That at the time of the commencement of said action to foreclose said mortgage, the said plaintiff in said action James Wilson had no knowledge or information whatsoever that any other person than the said R. E. Daggs and J. S. Armstrong had any claim whatsoever to said premises.

IX.

That said defendants R. E. Daggs and A. J. Daggs did conspire together to hinder and obstruct the said James Wilson in the collection of his said mortgage debt, and to that end did procure the said deed of conveyance from the said R. E. Daggs to said A. L. Johns, and to said end and for the said purpose did withhold the said deed of conveyance from the record until after the said foreclosure suit had been begun by the service of summons upon the defendants therein.

That the said deed from the said R. E. Daggs to said A. L. Johns was fraudulent and void as against said James Wilson and as against aforesaid mortgage, and was made and executed by the said Daggs and was recorded by him, the said Daggs, for the purpose of hindering and delaying the plaintiff in the securing the title and possession to the aforesaid mortgaged premises, and for the purpose of hindering and obstructing and delaying plaintiff in said foreclosure suit, James Wilson, in the prosecution of said suit against said John S. Armstrong and R. E. Daggs and for the purpose of hindering, delaying and obstructing said Wilson in the sale of said premises and in obtaining satisfaction of his said judgment by process of law.

Richard E. Sloan, Presiding Justice.
Fletcher M. Doan, A. J.
Webster Street, C. J.
Geo. R. Davis, A. J.

(See R. P. 140, F. 253 to R. P. 142 inclusive.)

Upon the foregoing statement of facts appellants offer the criticisms: First, it is largely a mere recital of evidence and not of ultimate facts. Second, it contains extracts copied from the opinion of the court below, which opinion was copied from the appellee's complaint. Third, extracts copied from the famous judgment of appellee. Fourth, it abounds in conclusions of law. Fifth, and is padded and upholstered throughout with false statements upon which there is not a dust or molecule of evidence in all the record to sustain—not some evidence, but none. The statement of facts should be a strict and honest deduction from the evidence and not a copy of the opinion, complaint or judgment, nor conjecture.

Proceeding to analyse the so-called statement of facts:

The so-called statement of facts No. I, II, III, is almost a verbatim copy of a part of the opinion of court below, (see R. P. 107-108) which opinion was in turn copied from the complaint of appellee. (See R. P. 3.) The court below further in its opinion used this language: "Presuming that the decree declaring the deed void is correct and that the evidence sustains it." (R. P. 112.)

This wholesale copying expediency, plus the statement here quoted indicates a grievous blunder has been made, and that they presumed the evidence sustained the complaint as they did that it sustained the judgment. The truth is, the most rigid examination of this record will disclose nothing to show that R. E. Daggs agreed and bound himself, his heirs, executors and assigns to pay the notes and mortgage of appellee.

The assumption clause in the deed from John S. Armstrong to R. E. Daggs is as follows: "The said Robert E. Daggs hereby assumes the payment of and agrees to pay two certain promissory notes, each for the sum of three thousand two hundred and fifty ($3,250) dollars, executed by said John S. Armstrong on or about April 18th, 1893, to James Wilson and Desda A. Wilson, his wife, and secured by a mortgage of the same date as said notes on the land hereby conveyed."

The above is every particle of evidence in this record that is offered to show that R. E. Daggs agreed and bound himself to pay the following note and mortgage securing it:

No. 1. Phoenix, Arizona, April 24, 1893.

On or before the 24th day of April, 1894, without grace, for value received, I promise to pay to the order of James

Wilson at the office of J. W. Evans, Phoenix, Arizona, Three Thousand Two Hundred Fifty Dollars in United States coin, with interest thereon at the rate of eight per cent per annum from date until paid, interest payable semi-annually. (Signed.)

($3,250.) John S. Armstrong.

The other note is a duplicate of this one except it falls due one year later.

The mortgage is of the same date of the notes and contains copies of the notes, is signed by John S. Armstrong, and covers the following property: 111 acres of land, 66 inches of water in Tempe Irrigating Canal, 5 city lots in Tempe, Arizona, and pro rata share No. 2 in McKinney and Kirkland ditch, and all lateral ditches to the same.

Carefully comparing the above assumption clause in the deed from John S. Armstrong to R. E. Daggs with the notes and mortgage sued the following will appear:

First. That the date of the assumption clause instruments are April 18, 1893, while the date of the note and mortgage sued on is April 24, 1893.

Second. That the name of the payor referred to in the assumption clause is John S. Armstrong, while that in the notes and mortgage is John S. Armstrong and Jno. S. Armstrong.

Third. That the amount referred to in the assumption clause is $3250 in each note.

Fourth. That the payee of the notes mentioned in the assumption clause is James Wilson and Desda A. Wilson, while the payee of the notes sued on is James Wilson, only.

Fifth. That the mortgage referred to in the assumption clause is merely referred to without stating who executed it, what property it covered, except that it covered the land hereby conveyed, which was 111 acres, while the mortgage sued on covers 111 acres of land and in addition thereto 5 city lots, worth $2,500, 66 inches of water, right in the Tempe Irrigating ditch, worth $3,500; share No. 2 in the McKinney and Kirkland ditch, worth $1,000, and all laterals, worth at least $500 more.

Sixth. R. E. Daggs, by the assumption clause, assumed notes only, and as descriptive of the notes this language is used: "And secured by a mortgage of the same date as said notes on the land hereby conveyed."

Seventh. The assumption clause in the warranty deed disputes the terms of the deed and makes it impossible that any part of the consideration was left unpaid. Such a hypothesis would dispute the verity of sealed instruments.

Eighth. The assumption clause does not say that the mortgage it refers to was ever of record or who was the mortgagee therein, while the mortgage here sued on is of record and the mortgagee is James Wilson.

It is then seen that the only point of similarity between these two sets of instruments is the amount referred to is the same. Any other paper having a like amount would be as satisfactory proof ast hat. It is no proof.

Well, it is said the name John S. Armstrong is the same. True, but there are so many names alike that where the identity of name appears and there is a dispute as here, the burden is on plaintiff to show the person referred to is one and the same by parole testimony. None appears in the record, so there is no evidence.

(See authorities supra on this point.)

Thus the statement of facts No. 1, 2, 3, as they were taken from the opinion, which opinion was taken from the appellee's complaint, has not molecular dust to rest upon. Again, statement of fact No. 3 contains this language copied from the opinion of the court below (R. P. 107): "And on the same date filed a lis pendens in the office of the recorder of said county."

This statement is absolutely false. The most scrutinizing search of all the evidence in this case will fail to disclose a particle of evidence about a lis pendens. None was ever put in evidence in this case. But as the Honorable Court below copied the statement of facts from the opinion and the opinion was likewise copied from the complaint of appellee, and they presumed the judgment correct and the evidence sustained it, they must have presumed the complaint of appellee was correct and the evidence sustained that also.

So far the statement of facts presents a mere copy of the opinion, a statement resting upon nothing and purely an assumption, upholstered with a false injection of the courts.

Will this mixture sustain the judgment? That judgment which gives one judgment against John S. Armstrong, two judgments against R. E. Daggs, two judgments against A. L. Johns and sets his deed aside at the same time with a

roving judgment against all parties defendant for conspiracy. We think not.

Again, the statement of fact No. 4 was copied from the opinion. (See R. P. 108.) It is true W. A. Daggs was living on the property openly and notoriously with his family when the first piecemeal suit was brought, but he was not made a party thereto. The opinion says he was in possession supposedly as the tenant of R. E. Daggs. Where the learned court below got the authority to say that this tenant was supposedly the tenant of any one this record fails to disclose. He was there and the appellee admits it, and had been for a long term of years under every owner of the property. His presence was notice of his landlord's title, just as much as if the landlord himself had been there on the farm, too.

W. A. Daggs could not be guilty of a conspiracy because he was the admitted tenant of this property.

Again, statement No. 5 was copied verbatim from the opinion. (See R. P. 108.) It is seen this statement of fact is copied from the opinion and the opinion is likewise copied from the appellee complaint (R. P. 4) with the false statement as to R. E. Daggs that judgment was taken in full upon the notes against him. (R. P. 45.) Where the judgment shows that no personal judgment was taken against R. E. Daggs in his first piecemeal foreclosure suit and the name of R. E. Daggs does not appear in the judgment except in the caption. A later clause in the judgment contains this language: "And that the defendants and all persons having liens subsequent to said mortgage and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of the notice of the pendpendency of this action in the office of the County Recorder of Maricopa County, Arizona, on the 11th day of March, 1894, be forever barred and foreclosed of all equity of redemption," etc.

It is seen that the recitals in this statement of fact present the same characteristics as the former statements. The Honorable Court could not resort to the opinion of the court below to help a statement of facts and have so held. Now these statements are copied from the opinion and presented to this court as a true statement of he facts.

It would be as competent to take the facts as stated in the opinion as it is to copy them and call them a statement of facts, and when it is seen also that the opinion is a mere copy of the appellee complaint it then appears that this court is not to have a statement of facts based on the evidence, but a statement of facts copied from the opinion of the court be-

low, which opinion is likewise copied from the appellee complaint. This state of matter sugar-coated with such false statement as judgment was, "and R. E. Daggs for the full amount due with costs." This is the statement of facts upon which the lower court gave its judgment and it is made here for this court to sustain the judgment with.

A statement of facts is defined by this Court to be "a finding of propositions of facts which the evidence establishes."

Jones vs. Jackson, Supra.

Now will a mere copy of the opinion which itself is but a copy of appellee complaint coupled with false statement of fact, be a statement of "propositions of facts which the evidence establishes."

Had the Honorable Court not as well be told by the Inferior Court to read our opinion and complaint of appellee and sustain our judgment as to copy them and send them here as a statement of facts?

Again, statement of fact No. VI is again copied verbatim from the opinion of the court below (see R. P. 112), which statement in the opinion was copied from the complaint of appellee (see R. P. 4 and 5), and like its former kinsmen contains absolutely false statement in that it says execution was issued. Not so. If he had he would have got the cash on it. This suit would not be in this Court today an order of sale issued, but no execution. This false injection is to have this Honorable Court believe that the plaintiff is not refusing to issue execution against the mortgagor if he has any claim They fear it is not good faith to have a judgment against a man worth $300,000 (see R. P. 67-68-70), and refuse to issue execution against him, while they clamor they can't get their pay. This record fails to disclose such a thing as an execution. It also fails to show that the plaintiff bid the property in at the sale. The record shows it was bid in by James Wilson, who paid cash to sheriff, who in turn paid it over to the appellee attorney (see R. P. 50.) If appellee should have desired to show that James Wilson, the purchaser at the sale, was the James Wilson, plaintiff, he should so proved. He could not do so, so he left the record bare as it is. (If we were entitled to go out the record we could truthfully say Wilson, purchaser, was the cohort of the mortgagor.)

There is nothing in the evidence to show there ever was a deed issued upon the sale of the property. There is no deed in the record. As to the redemption there is nothing

in the evidence to show anything whatever about that. These are pure gratis assumptions of the Court below, taken from the opinion and appellee complaint. That the tenant refused to give him possession is of no consequence. It is a singular state of things that appellee relies on sending an agent to bluff the tenant out of possession and refuse to issue a writ of assistance, and then the Court below sees so much in that that a statement of facts is made upon it. How can such stuff prove the liability of R. E. Daggs or in any manner show fraud on the part of any of these appellants?

Statement of fact No. VII down to the word Illinois is a verbative copy of a clause in the opinion (see R. P. 108). The balance except the word Wilson is also a verbatim copy of the complaint, which was also partially garbled from the appellee complaint, but is changed to show as far as possible and have it appear that the only time James Wilson knew of W. A. Daggs, the tenant, was when demand for possession was wade December 12, 1894. This is to remove as far as possible the fact that James Wilson knew of W. A. Daggs' tenancy, and A. L. Johns, his landlord, and the whole of their rights when he first sued, so that it will be presently tenable to say Wilson had no notice of their rights, but unfortunately for them the appellee alleges in his bill that W. A. Daggs "at or about th time of recording of said deed to said Johns, to-wit, on the 28th day of April, 1894, claimed and asserted to have abandoned said premises and property as tenant of R. E. Daggs on or about April 1st, 1894," and became the tenant of A. L. Johns. This shows appellee had a coloquy about the property on that date and the tenant told him face to face all about it. Still neither the tenant nor Johns were brought in and it is all stuff to say he had no notice or to say as is said or the inference cast that a lispendens was filed. No such a paper in this record. It is false. There is nothing whatever in the rabble about Johns' deed being placed on record after summons or lispendens. If Johns didn't put his deed on record, what of it? His tenant was on the property. Suppose Johns in person had been on the property with his deed in his pocket when appellee first sued? It could be as loudly yelled that he was there supposedly as the tenant of R. E. Daggs, in whom so far as the record disclosed the title appeared to be. This statement proves nothing. It does not show any one guilty of fraud. Fraud consists in the intention and in a deed that it has no consideration. All parties must participate. It would amount to nothing whatever if Daggs said all they say he said in the statement. It's no fraud. And if these two parties even if they knew about the first suit and the lispendens and they still went about their business, that's not fraud.

This clause, like the rest, is not founded on the evidence, but copied from the opinion and is so made as to inferentially contradict the appellee bill about appellee having and knowing all about Johns' deed.

Singular as it is, appellee proved by his own testimony that Johns had paid every dollar that the deed calls for. Still no statement of fact is made on that. It is not found Johns paid a valuable consideration, neither is it found Johns paid any consideration. Silent. Silent.

Statement of fact No. VIII is still another one of the same as before, copied from the opinion (see R. P. 109.) This in turn was copied from the appellee bill (see R. P. 5). This is the boldest of them up to it. While it is copied out of the opinion and the opinion copies the appellee complaint, This is the first so-called statement that is totally and absolutely false. There is no evidence whatever in this record about it, not a particle, and it is put here in the face of the finding that the tenant was on the premises and they knew it, but they did not make him a party, and if he had no notice does it prove fraudulent intent or that Johns' deed was without consideration? They seem to be looking for sham excuses for appellee. Does this even up the appellee default in refusing to issue execution? It is a claim flatly contradicting the appellee's bill and contradicts the former finding that W. A Daggs was on the property.

Statement of fact No. IX: This statement in part is taken from the opinion (R. P. 108-9) which is likewise copied from the appellee bill (R. P. 4), while the balance of this statement is a verbatim copy of a part of the judgment of appellee (see R. P. 58.) It is not only false, but flatly contradicts the evidence. It abounds in conclusions of law such as: "That said deed was fraudulent and void." Facts should be stated showing this deed fraudulent and void. No deed can be set aside on such statement as that.

It is like its previous kinsmen, padded with a false statement, to-wit: "And was recorded by him, the said Daggs." The deed on its face shows as follows: "Filed and recorded at the request of Bank of Tempe April 28, 1894. at 8:30 a. m."

Appellee also proved by his own testimony the direct examination of R. E. Daggs as follows:

Q—Where was this deed from you to Johns at that time —at the time the summons was served on you in this case of Armstrong and Wilson against you?

Ans.—I don't know.

Q.—How long since you have seen it?

Ans.—I don't remember now, but I suppose I have not seen it since I executed it.

Q.—Were you present at the time of the summons of this case?

Ans.—Yes, sir.

Q—Do you know when the deed from yourself to Johns was recorded?

Ans.—I do not know; I will state that there was a good many deeds that came into our bank and we forwarded them to be recorded. (See R. P. 27.)

Again on (R. P. 33) the following was asked:

Q.—Do you know what you did with the deed you executed to Johns?

Ans.—I sent it to him, of course, or sent it to Mr. A. J. Daggs for him.

The evidence of this witness also showed that this sale to Johns was made through A. J. Daggs, his agent, who was doing business in and out of Chicago with live stock.

And this is every particle of evidence on the point of who recorded the deed from R. E. Daggs to A. L. Johns, and this was all evidence produced by the appellee, which he never attempted to dispute or disprove. Still the court below makes the alarming statement that this deed from R. E. Daggs to A. L. Johns was recorded by him the said R. E. Daggs to hinder and obstruct, and etc. This statement is not only false, but it contradicts every particle of evidence in the record on that point, all of which was introduced by appellee. This is not all. It was copied from the judgment of the appellee and does not purport to be founded on any evidence. It is from his judgment, which is presumed to be conclusions of law, and which was presumed to be correct and sustained by evidence.

Now the very point disclosed by this so-called statement of facts show that if it was admitted as a whole it is not sufficient under the law to set a deed aside on the ground of fraud. Suppose it is true that this deed was made to obstruct this appellee in the collection of his said claim, and these parties tried to hinder and delay him and to obstruct him, and appellee have a mortgage lien on the property? It is simply impossible under the law to do it. That appellee is compelled to go to court to foreclose is no obstruction to

him nor delay, and he can't claim he is damaged for that When appellee goes there all he has to do is to bring in all parties and close them out, and he is through. But suppose the mortgagee begins like he has here, with a piecemeal foreclosure and refuses to bring in the parties? Then colludes with the mortgagor to defraud the grantees and refuses to issue execution against the mortgagor. Where can be found his right in equity to set a grantee's deed aside whom he proves by his own evidence has paid $11,500 for the property he received and received a warranty deed therefor? (See R. P. 29, where consideration is proved.)

This is not all. The Court below has changed the theory of the appellee bill. Appellee sued on the alleged contracts of assumption and took five judgments on them. He sued for conspiracy and alleged his additional damages to be $1,000 as a lump sum against all (see R. P. and 6.) The Court below throws the appellee down on his suit to recover on the alleged contracts of assumption, and disregarded him altogether, refused to let him have it, and changed his suit for damages to a creditor's bill to set a deed aside on the grounds of fraud (see R. P. 5 and 6.)

They do not for once find Johns paid nothing for his deed. On the contrary, they prove he paid a valuable consideration for the property.

They do not find that Johns participated in the so-called fraud of his grantor.

Since it is necessary to follow the will-o'-the-wisp rulings of the Court below and since it is thrust upon the appellants to relieve themselves therefrom, it becomes necessary to resort to the laws of Arizona and compare the findings with that law and the bill to ascertain whether the findings under the law of fraudulent conveyances even wil sustain the judgment.

Rev. Stat. A. T., Par. 3031, Sec. 2, is, to-wit: "Every gift, conveyance, assignment or transfer of or charge upon any estate, real or personal, any suit commenced or decree, judgment or execution suffered or obtained, and any bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to, shall as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for a valuable consideration unless it appear that he had notice of the fraudulent intent of his immediate grantor."

Rev. Stat. Par. 2032, Sec. 3, is to-wit: "Every gift, conveyance, assignment, transfer or charge made by a debtor which is not upon consideration deemed valuable in law shall be void as to prior creditors, unless it appear that such debtor was then possessed of property within this territory subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent conditions, and though it be decreed to be void as to prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers."

Rev. Stat. of Arizona, Par. 2037, Sec. 8, is to-wit: "The question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers solely on the ground of that it was not founded on a valuable consideration."

These three sections is all the law controlling fraudulent conveyances in Arizona.

An analysis of Par. 2031 shows that (aside from the exception) two things must happen and concur, else it is impossible for fraud to be committed under that Par. 1st the grantor in the conveyance must have creditors, purchaser or other person to be defrauded or wronged. Is R. E. Daggs a debtor of James Wilson? No. Has he any contract with James Wilson? No. When R. E Daggs purchased of John S. Armstrong he paid as the warranty deed that passed and in the record shows the full consideration for the property purchased, and received a warranty deed with covenants to warrant and defend the property against all claims and especially the claim of appellee. R. E. Daggs was not a debtor of the mortgagor. Suppose the mortgagor should bring suit to enforce the so-called contract of assumption in this warranty deed and show (supposing that he could) that R. E. Daggs had assumed and agreed to pay the claim of appellee, what would happen? R. E. Daggs would plead that the mortgagor had received full consideration for the property and had warranted the title against all claims. The deed under seal would prevail, together with the proof that the full consideration had been paid. This would render the so-called contract of assumption a mere nudum pactum unenforceable by the mortgagor. He would then have no contract he could enforce. How could the mortgagee reach an asset of the mortgagor unless the mortgagor had an asset to react? How could the mortgagee enforce a contract the mortgagor who made it and from whom the considera-

tion flowed could not enforce? Where does this mortgagee's right come in? R. E. Daggs is not then the debtor of either the mortgagor here or the mortgagee. So that feature of the law fails.

The second is the fraudulent intent of the debtor. R. E. Daggs not being a debtor of either the mortgagor or mortgagee they are not in a position under the law to complain of his pretended frauds. It is simply none of their concern.

3. Under the exception of the paragraph a search of the record shows (R. P. 29) that R. E. Daggs received a valuable consideration from A. L. Johns for the property. This was proved by the appellee's own testimony and stands uncontradicted and unimpeached. It appears then that the purchaser, A. L. Johns, paid a valuable consideration and unless it appear that A. L. Johns had notice of the fraudulent intent of R. E. Daggs, his immediate grantor, and participated in it, there is no ground or crevice for the law to set his deed aside. It is not found by the Court below that Johns participated in the so-called fraud of R. E. Daggs and for the very best reason, that there never was any fraud.

Now, then, as to Par. 2032 of the law, the contention of the appellee totally and absolutely fails. The reasoning applied to R. E. Daggs not being a debtor of John S. Armstrong and in no wise a debtor of James Wilson, applies with equal force to A. L. Johns as to Johns being a debtor of R. E. Daggs and a debtor of James Wilson. He is not a debtor. He owes the mortgagee nothing nor R. E. Daggs. Hence under this section the appellee must fail.

Under Par. 2032 if it is contended that the contention here falls within the terms of that paragraph. Then we say this record shows that R. E. Daggs has an abundance of property right here in Maricopa County, Arizona (see R. P. 68), where R. E. Daggs swears that on the 26th day of A. D., 1895, he owned and possessed more than 490 acres of land and other property and is perfectly responsible for any contract he would make or judgment that might be given against him. This fact is not disputed or denied by appellee anywhere in this record.

It is therefore clear that under neither of these paragraphs, 2031 or 2032, can the appellee sustain his contention as against R. E. Daggs. He committed no fraud when he sold his property to Mr. Johns.

It will be seen from Par. 2037 in addition to both of the former sections that two things must appear: First, a fraud-

ulent intent, which is made a fact, so that must appear by evidence; second, and the paper must be without consideration.

It would there appear that before the appellee can obtain or this judgment sustained it must be shown: First, that R. E. Daggs is a debtor. Appellee has no judgment against him (see R. P. 45). He has no contract with him wherein he can enforce and get a judgment. Appellee is no creditor of R. E. Daggs. Appellee then has nothing to do with his frauds. R. E. Daggs has done nothing wrong. It is bosh to say so.

Now then in order to set the deed from R. E. Daggs to A. L. Johns aside on the grounds that it hinders, delays or obstructs James Wilson, it must affirmatively appear by the finding of facts.

First: That R. E. Daggs is a debtor of James Wilson.

Second: That R. E. Daggs is insolvent.

Third: That the deed from Daggs to Johns was made with a fraudulent intent to defraud James Wilson.

Fourth: That it was without consideration. These things must happen and concur under the laws of Arizona before a deed can be set aside.

Fifth: In addition to this, says the law, if it appear, as it does here, that the purchaser paid a valuable consideration then the deed cannot be set aside unless it be further shown that the grantee knew of and participatd in the fraudulent intent of his immediate grantor.

Conceding, for argument, that on th fierst proposition R. E. Daggs by the statement is found to be a debtor of James Wilson, and the statement of fact finds this:

Second: It is not found that R. E. Daggs is insolvent. What is to prevent a solvent person from giving his property away promiscuously, so long as he keep enough to pay his debts? Paragraph 2032 as to prior creditors says if it appear that the debtor has property then to pay his existing debts. R. E. Daggs had 490 acres and other property, so appellee fails as to that, and the statement of facts totally fails to find that R. E. Daggs is insolvent.

Third: As to the fraudulent intent, if a man's solvent concede that the copy from the judgment is sufficient to show a fraudulent intent, how could this effect the appellee? It is absurd to say he could be in any way injured; hence this is of no avail.

Fourth: It is not found that the deed from R. E. Daggs to A. L. Johns is or was without consideration. On the contrary the record shows it was proved by the evidence to be for a valuable consideration. R. E. Daggs actually receiving the full consideration from A. L. Johns. Appellee then fails on this point.

Fifth. It being then in the evidence that a valuable consideration was paid the grantee then must have known of and participated in the fraudulent intent of R. E. Daggs and this fact also must be found before the deed from Daggs to Johns can b est aside. This fact is not found. None exists.

The conclusion then reached under the law quoted is that the finding of extracts of the opinion and judgment and conclusions and falsehoods fails to find three necessary ingredients essential to setting the deed from R. E. Daggs to A. L. Johns aside.Therefore the so-called statement of facts does not sustain the judgment. This statement of facts is unfair. It refuses to state the record as the record is.

The intent to defraud must not only be found to exist on the part of the grantor, but that intent must be found also to have been participated in by the grantee.

Rev. Stat. A. T., Par. 2031 Supra.

Gotlieb vs. Thatcher, 151 U. S. 271.

Curry et al, assignees, vs. Floyd, 22 Fed. 258.

Grinsky vs. Parlin, 42 Pac. 575.

In Priest vs. Brown, 35 Pac. 325, the Court said: "Where one party conveys land to another for a valuable and adequate consideration the conveyance will be good against the creditors of the grantor, although the latter intended thereby to defraud his creditors if the grantee had no knowledge of such intent and was in no way a participant in the fraudulent purpose."

Johns is not found to have participated in the fraudulent intent. Neither is it found there was no consideration for his deed. The findings of opinion, complaint, judgment and false statements and conclusions of law will not sustain the judgment. The appellee's complaint, judgment and findings of facts abound in, hinder, delay, obstruct, defraud, conspiring, combining, fraudulent, defrauding, fraud, etc.

In Van Weel vs. Winston, 115 U. S. 228, the Court said: "Mere words in and of themselves and even qualifying adjectives of more specific charges are not sufficient

grounds of equity jurisdiction unless the transactions to which they refer are such as in their essential nature constitute a fraud or breach of trust, for which a Court of Chancery can give relief."

Ambler vs. Choteau, 107 U. S. 586-590.

Again, how can the Court below refuse to state the facts that the evidence proved by the appellee shows and in its stead copy the opinion and complaint pad this copied matter with statement that never existed in fact and never was intimated in the evidence, and couple this with conclusions of law and pass this bogus concoction as the ultimate propositions deduced from the evidence upon which the rights of the parties under the law rests?

Again, what legal right does the Court below possess to strike down the complaint of appellee on his suit wherein he sues appellant Johns on the so-called contract of assumption and says Johns is his debtor and his suit for $1,000 additional damages and thereby change the entire theory of appellee case and substitute therefor a creditor's bill seeking to remove an obstruction from the collection of a judgment when no judgment exists against R. E. Daggs (see R. P. 45, that no judgment exists against R. E. Daggs) and John S. Armstrong is not before the Court.

The Court below changed the entire theory of the appellee complaint mixture. The Court below selected a theory that did not exist and one that would be the most injurious to the appellants. Johns' legal right to redeem from the sale is stricken down. He must go out empty handed after appellee proves he paid in full for the property.

There is no theory of equity or law by which this judgment can be permitted to stand. There is no theory known to the code or any other system of administrative justice that countenances the character of proceedings here.

A creditor's bill cannot be maintained under such allegations as this bill presents. The pleader never supposed he was filing a creditor's bill. The subject of a creditor's bill was never thought of. A creditor's bill dragged out of the reforeclosure of a mortgage is absurd. That upon the allegation of appellee bill that these appellants should assume and agree to pay his demand and thereby seek to defraud him is preposterous and absurd in the extreme. The pleader never presumed he was carrying such a bill. The Court below presumed it for him as they presumed the judgment correct and the evidence sustained it.

What then is there for this Court to do in this case but to revert these parties to the contracts they made hemselves, as we have heretofore suggested? The mortgagor should not be allowed to escape his contract and reap the profits thereof. The mortgagee should be compelled to pursue him. He agreed and warranted this property against all claims and took from his grantee the money to pay this claim with. He is worth over $300,000 in the jurisdiction of the Court below and appellee refuses to pursue him, but colludes with him. The appellee has no contract with the grantees of the mortgagors and has no right to pursue them or set their deeds aside and bring havoc and slaughter to them and cause a multiplicity of endless litigation to no advantage of appellee unless he can get $15,000 worth of property for his alleged claim of $6,500. They bought and paid for the property once and they should be protected in their transactions made and consummated in perfect good faith, as this record shows. Why should they be slaughtered? Upon this plan the appellee will not lose, but get his claim, if claim he has. The mortgagor will be compelled to pay it as by his contract he agreed to pay it, and this collusive suit between the mortgagor and appellee be frustrated, and every one connected with this transaction be compelled to follow the contract.

Appellants then ask the Honorable Court to accept and follow this plan and thereby do no injury to any one in law or fact, but do right and dismiss this suit.

Respectfully submitted.

A. J. DAGGS,

Attorney for Appellants.